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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

PASCUAL R. RODRIGUEZ
Petitioner

vs.

IBP, INC.
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit.

PETITION FOR WRIT OF CERTIORARI

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90 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court's post trial discovery order violated well settled discovery rules and constitutional due process.

2. Whether plaintiff was entitled to appeal or obtain a ruling on his motion to stay prior to having to comply with the post trial discovery order.

3. Whether sanctioning plaintiff $411,000.00 for challenging the validity of a post trial discovery order is constitutionally excessive.

LIST OF ALL PARTIES

Petitioner/Appellant, Pascual R. Rodriguez.

Respondent/Appellee, IBP, inc.

There are no parent of subsidiary companies to be listed.

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BASIS FOR JURISDICTION

The judgement of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") was entered on March 14, 2001. The Court of Appeals denied a timely petition for rehearing on May 30, 2001.

JURISDICTION

28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Petitioner's cause of action is based on State common law and the petition for certiorari is based on Federal principles and constitutional issues.

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law ..."

The Due Process clause of the 14th amendment.

Rule 26 of the Fed.R. Civ. P. that regulates pre trial discovery.

Rule 59 of the Federal Rules of Civil Procedure do not have any provision for post trial discovery.

The absence of cases, statutes or provisions that allow a losing party to seek and obtain post trial discovery to attack a verdict.

STATEMENT OF THE CASE

This is an employment retaliatory discharge case, a tort action. The petitioner, Pascual Rodriguez, was fired by respondent, IBP, inc., in retaliation for his pursuit of workers'

compensation remedies under the Kansas Workers Compensation Act, and for injury related absences.

A. BACKGROUND OF THE TENTH CIRCUIT DECISION

This case was filed in May of 1994. The case was submitted on summary judgment and pending appeal for several years. On April 9, 1999, just ten days prior to the trial, the parties ascertained that during the pendency of the case, Mr. Rodriguez had began receiving social security disability benefits. Therefore, the trial court ruled that plaintiff could not claim damages after he began receiving social security benefits. As such, during the trial, it was stipulated by the parties that Mr. Rodriguez' monetary damages would be limited to six months wages or $11,000.00.

The jury found that IBP fired Mr. Rodriguez in retaliation for exercising rights under the Workers Compensation Act. The jury awarded Mr. Rodriguez $11,000.00 in past lost earnings and benefits, $200,000.00 in future emotional distress, pain and suffering, embarrassment, and humiliation, and $200,000.00 in past emotional distress, pain and suffering, embarrassment, and humiliation. (Appendix L)

After the trial, defendant asked the Court to allow it to conduct post-trial discovery to attack the verdict. In an order ruling on post-trial motions, the court ordered Mr. Rodriguez to provide defendant with a signed authorization for social security records. (Appendix C) Plaintiff moved the court to alter the judgment regarding the social security authorization. The District Court declined to alter the judgment ordering the authorization. (Appendix E) Plaintiff appealed the judgment ordering the authorization to the Tenth Circuit Court of Appeals.

Following plaintiff's appeal to the Tenth Circuit, the District Court continued to assert jurisdiction over the matter, asking the parties to brief the issue of whether or not the

District Court continued to have jurisdiction to compel plaintiff to provide the authorization. The District Court decided that in spite of plaintiff's appeal, it did have jurisdiction and ordered plaintiff to show cause why he should not be held in contempt of court for refusing to provide the authorizations. (Appendix F)

On October 13, 1999, the District Court threatened to enter sanctions against Mr. Rodriguez, by a method of progressively eliminating the jury's award. (Appendix G) In this extraordinary decision, the District Court, in effect, threatened to assess a $411,000.00 sanction against Mr. Rodriguez for not complying with a post-trial discovery order while his appeal was pending. (Appendix G) Plaintiff immediately filed an appeal of the decision threatening sanctions to the Tenth Circuit Court of Appeals.

After the trial Court refused to stay the threatened sanctions, plaintiff filed a motion with the Tenth Circuit to Stay the effects of the Orders of the District Court to provide the social security authorization and the threatened sanctions against Mr. Rodriguez. The Court entered an Order that appeared to deny the stay but indicated that the merit panel would decide the validity of the orders. (Appendix I) Upon a motion for clarification, the Court ruled that plaintiff did not need to provide the release. (Appendix J) The Court stated: "As stated in our December 16 Order, plaintiff need not now produce the release ..." (Appendix J) However, the merit panel assumed, without a specific ruling, that the threatened sanctions had automatically eliminated the verdict. (Appendix A)

> The Tenth Circuit stated:
>
> "While the ultimate sanction negated Rodriguez money judgment, that did not render the sanction Draconian." at p. 20. (Appendix A)
>
> Since plaintiff never had a opportunity to comply with the Order to provide the

release and avoid sanctions, the Court's assumption that the threatened sanction eliminated the judgment automatically, deprived plaintiff of $411,000.00, costs and interest, without due process.

A sanction of over half million dollars to plaintiff, without the benefit of a ruling on his motion to stay violates his Fifth and Fourteenth amendment rights to due process.

In this petition for certiorari, plaintiff submits to the court that the District Court's post trial discovery order violated well settled discovery rules and constitutional due process; plaintiff was entitled to appeal or obtain a ruling on his motion to stay prior to having to comply with the post trial discovery order; and assessing sanctions of $411,000.00 plus cost and interest for challenging a post trial discovery order is unconstitutional.

The 10th Circuit Court of Appeals should have issued an order as to whether plaintiff needed to provide the social security release or not. This is particularly true since plaintiff had specifically been told on December 16, 1999 and on January 10, 2000 that he did not need to provide the release. (Appendix I and J)

B. BASIS FOR FEDERAL JURISDICTION

Jurisdiction of this action was conferred upon the district court on the basis of diversity of citizenship, 28 U.S.C. § 1332. Mr. Rodriguez, is a citizen of the state of Kansas. Respondent is a Nebraska corporation with its principal place of business in Nebraska.

ARGUMENT

1. THE DISTRICT COURT'S POST TRIAL DISCOVERY ORDER VIOLATED WELL SETTLED DISCOVER RULES AND CONSTITUTIONAL DUE PROCESS.

Defendant deposed Plaintiff on October 20, 1995. During Mr. Rodriguez' deposition, defendant failed to ask a single question about social security benefits. In fact, defendant failed to ask about disability benefits of any nature. After the close of discovery, the District Court granted defendant's summary judgment. The 10th Circuit, on July 20, 1998, reversed the decision of the District Court and ordered a trial. After the reversal, the District Court re-opened discovery. Defendant had almost three months, until October 29, 1998 to conduct additional discovery. Defendant did not conduct any discovery during that period of time.

From July 1998 to October 29, 1998, defendant could have re-deposed Mr. Rodriguez, could have conducted written discovery, could have had Mr. Rodriguez examined by a physician, could have had Mr. Rodriguez examined by a psychologist or by a mental health provider. However, during those three months, defendant conducted absolutely no discovery whatsoever.

Several months after discovery closed for the second time, the parties learned during a settlement conference that plaintiff had applied for and was receiving social security benefits disability. Defendant asked plaintiff to look for his records and provide copies of the same. Plaintiff agreed, but later informed defendant that he could not locate any records. Defendant asked informally for information of plaintiff's counsel. Plaintiff's counsel did his best to assist defendant in obtaining information and provided the information that Mr. Rodriguez was given by Social Security.

Defendant made the strategic decision to devote its resources to a motion in limine to prevent plaintiff from presenting evidence of damages. In fact, up to the first day of trial, the lawyers that tried the case for the defense conducted no discovery whatsoever.

Three days after the jury rendered its verdict, defendant asked plaintiff to sign a release for his Social Security records. Plaintiff declined to submit to post-trial

discovery. In its post-trial brief, defendant asked the Court to order plaintiff to submit to post-trial discovery. Defendant cited no authority for its request. In the Court's July 2, 1999 Order denying defendant's motion for judgment as a matter of law or for new trial, the Court ordered plaintiff to provide defendant with a signed release for Social Security records. (Appendix C)

Having denied defendant's post-trial motions, there was nothing left for the Court to do other than execute the judgment.

The Court's Order requiring plaintiff to produce social security records after a verdict to allow defendant to attack the verdict is unprecedented in U.S. jurisprudence and violates all discovery rules that are designed to uncover evidence before trial. Plaintiff has not found a single case in which a Federal Court ever ordered a prevailing party to submit to post-trial discovery to allow the losing party attack the verdict. The procedure is totally, utterly and completely unprecedented.

The Federal Rules are replete with references to the purpose of discovery. Fed.R.Civ.P. 26(b) defines the scope and limits of discovery. Specifically, the rule provides that discovery can be obtained in any matter not privileged which is relevant to the subject matter involved "in the pending action". The rule goes on to provide that the information sought need not be admissible at trial but it has to, at the very least, appear reasonably calculated to lead to the discovery of admissible evidence. Again, the operative term is a "pending action".

Discovery must occur within a defined period of time. For example, Fed.R.Civ.P. 26(f) prohibits discovery prior to the meeting of the parties. The rule also prescribes that there should be a deadline for discovery to be completed. In fact, the entire scheme of the Federal Rules provides for specific timing for discovery. The Federal Rules provide for a specific time frame following the filing of the action and prior to trial for completion of discovery. The Rules also

provide that discovery rules are not a hunting license to conjure up claims that do not exist. *Young v. Shilaos*, 35 F3d 441, 195 WL 12003(10th Cir. (Utah) Cir. (Utah)Public Citizen which was followed by the 10th Circuit, the District Court could not have imposed any additional discovery duties upon plaintiff.

Defendant's discovery request was made three days after a verdict had been rendered. However, even if defendant's request for discovery had come just prior to trial, it would have been untimely. Our courts have devised a specific test to determine the timeliness of a discovery request. The Tenth Circuit has allowed parties to reopen discovery only in unusual circumstances, and never **after a verdict has been rendered.**

The following factors are considered in determining the appropriateness of reopening discovery: (1) whether trial is imminent; (2) whether the request is opposed; (3) whether the non-moving party would be prejudiced; (4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court; (5) foreseeability of the need for additional discovery in light of the time allowed for discovery by the Court; and (6) the likelihood the discovery will lead to relevant evidence. *Ropfogel v. United States*, 138 F.R.D. 579, 585 (D.Kan. 1991); *Sil-Flo, Inc. v. S.F.H.C., Inc.*, 917, F.2d. 1507, 1514 (10th Cir. 1990); *Smith v. United States*, 834 F.2d 166, 170, 169 (10th Cir. 1987)

Thus, under the unusual circumstances test, defendant is not entitled to re-open discovery if trial is imminent. It follows that there can be no discovery allowed after trial. However, even if the Court applies this test, defendant can not meet the necessary elements of the test. In this case, (1) The trial is not imminent but had already been conducted. (2) The request was clearly opposed. (3) Plaintiff would be greatly prejudiced by an unprecedented and dangerous procedure that would endangered the finality of all verdicts, and would further delay and increase the cost to plaintiff. (4) Defendant has no excuse for having failed, at the

appropriate time, to request the information it was seeking after trial. Defendant was simply not diligent in obtaining discovery within the guidelines established by the Court, and it cannot remedy its lack of diligence by reopening discovery after trial. To allow otherwise would prejudice plaintiff and reward defendant for its lack of diligence. (5) Defendant has never complained that it did not have sufficient time to conduct discovery. As such, the foreseeability of the need for additional discovery in light of the time allowed for discovery by the Court is not applicable. (6) Finally, there was no evidence whatsoever of the likelihood that post trial discovery would lead to relevant evidence.

In *Sanjuan v. IBP, Inc.*, Case No. 94-CV-1541-DES the court tried the case to a jury beginning June 30, 1999. The case concluded on July 13, 1999. Prior to the trial, defendant filed a motion seeking to compel plaintiff to provide a release for social security records. At a hearing prior to jury selection, the Court denied defendant's motion. In a post-trial motion, defendant raised the issue of Social Security release. The Court ruled, citing defendant's negligence in seeking to obtain such information during pretrial discovery. In the Court's Memorandum and Order of March 10, 2000, Judge Saffels ruled:

> Finally, IBP argues it was prejudicial error for the court to deny its motion to compel plaintiff to sign a release for social security records. IBP requested that the plaintiff sign a consent form fourteen days before trial. Sanjuan refused to sign the consent on June 23, 1999, claiming that the Social Security records request was untimely and not included in IBP's discovery requests. The defendant did not file a motion to compel until June 29, 1999, the day before trial. The deadline for discovery had expired, and IBP never sought to reopen discovery. IBP had more than three years to request the social

> security records, but chose to submit its request on the eve of the second trial. Any prejudice suffered by IBP is a direct result of IBP's own neglect to get their request before the court in a timely manner. (Supp. App. 142)

In *Sanjuan*, Judge Saffels ruled that defendant's request was too late some fourteen days prior to trial. In the present case, the same defendant requested that the release be signed three days after the verdict was rendered.

Incredible, and without any authority, Judge Thomas Marten ordered plaintiff to submit to post trial discovery to see if defendant could defeat the verdict. The motive appears clear. The 10th Circuit reversed the trial court regarding summary judgment and ordered a trial. A jury awarded damages to plaintiff and the trial court still wanted to take it away from plaintiff.

While it is true that prior to the trial, defendant made an informal request for plaintiff to provide documents regarding Mr. Rodriguez' social security benefits, that is all defendant did. Mr. Rodriguez had none, so he went to the Social Security office. The only document that the Social Security office in Topeka, Kansas gave him was the information about the amount of his benefits and when they commenced. This seemed to be enough for defendant. Defendant used this information to file a Motion in Limine. The trial Court granted the Motion in Limine, limiting Mr. Rodriguez economic damages to the months from the time defendant fired Mr. Rodriguez to the month that he began receiving Social Security benefits or $11,000.00. Upon defendant's insistence the parties stipulated to a limit on economic damages to $11,000.00. This was all that defendant sought prior to trial. Defendant did not seek any other information or documents regarding Mr. Rodriguez' Social Security benefits, until defendant lost at trial.

Therefore, as a result of plaintiff's inability to provide records about his social security benefits, the trial court sanctioned plaintiff by precluding him from claiming damages for more than six months. After the trial, the court again sanctioned plaintiff for the same inability to provide records and took away his verdict.

The Court punished plaintiff twice for the same inability to provide documents. This is analogous to a double jeopardy violation.

In its post-trial Orders, the District Court implied that defendant requested the Social Security release prior to the trial. The facts are that not once did defendant informally or otherwise asked for a social security release prior to trial. Three days after the jury rendered its verdict, defendant's counsel Brian Markley called plaintiff's counsel and asked for the first time for a release for plaintiff's social security records. He indicated that if plaintiff would sign a release for social security records, defendant could obtain the records the same day. Mr. Markley specifically indicated that defendant wanted to see if there was something that defendant could use to attack the verdict. It was apparent that defendant had simply not thought of requesting a release prior to trial. Apparently, after trial, defendant figured out that it could have obtained plaintiff's social security records almost immediately had defendant elected to conduct discovery. Plaintiff responded to defendant's request in a letter dated April 29, 1999, declining such request and citing the unprecedented nature of the request and the inappropriateness of the same.

The fact that defendant decided after trial that it should have obtained plaintiff's social security records, clearly indicates that defendant had made a strategic decision not to obtain the records prior to trial. Defendant even knew that it could obtain the records instantaneously. Therefore, a party that waits until the jury returns an unfavorable verdict to complain about what it could have done prior to trial is bound by that risky decision and should not be granted relief.

Instead, defendant chose to file an extensive Motion in Limine to preclude plaintiff from seeking damages beyond the period of time after which plaintiff began receiving social security benefits. The Court granted defendant's motion. Therefore, the only reason that defendant sought the records after the trial is because its choice of strategy proved ineffective and it lost at trial.

Defendant relied exclusively on its effort to persuade the Court to prevent plaintiff from presenting evidence of damages. Defendant was successful in its strategy since the Court granted defendant's motion to preclude plaintiff from claiming damages after the date in which plaintiff began receiving Social Security benefits.

Ironically, defendant blamed plaintiff for allegedly failing to provide a release, for which defendant never asked prior to trial. In a blatant misrepresentation of the record in this case, defendant blamed the Court for "Allowing plaintiff to proceed with this case after failing to provide even a release for the Social Security records . . ." and argued that the Court committed prejudicial error by allowing plaintiff to proceed with this case after failing to provide even a release for the Social Security records.

After the trial, defendant submitted into the record a blank Social Security application form to argue that it would have been important for it to know plaintiff's answers to the questions in the form. Again, this was a belated argument that was never made before, was not raised during trial and defendant appears to think that it could do a better job if given a second chance or in this case a third chance. Defendant never explained why it did not use the questions in the form to cross-examine plaintiff during trial. Defendant could have easily gone through each question in the form while examining plaintiff at trial. However, the record reflects that even at trial, defendant did not ask plaintiff a single question about his social security benefits.

If this issue was of such importance as defendant argued after trial, and of such crucial relevance, defendant totally failed to explain why it did nothing to address the social security issue prior to trial or during trial.

In this case, defendant did not take any action to procure discovery and therefore was not entitled to move to compel. Even if it is assumed for purposes of argument that defendant propounded discovery, and even if it is assumed that there was non-compliance by plaintiff, after the prescribed period of time within which defendant was required to move to compel, any discovery dispute was absolutely waived.

After discovery closed in this case, defendant could not have any reasonable expectations related to discovery.

> If plaintiff was hampered in examination by defendant's failure to produce particular documents at deposition, plaintiff should have raised the issue before the deposition was concluded, not two months after close of discovery, and thus, plaintiff could not compel production." *Krauss v. First City Nat. Bank and Trust Co.*, 125 F.R.D. 80, (S.D.N.Y. 1989).

Likewise, in this case, defendant was not entitled to any discovery after discovery closed.

It can not be emphasized enough that during the first five years of litigation in this case, defendant was entitled to and did conduct any and all discovery that it deemed necessary to defend the case. After the Court of Appeals remanded this case, the Court again reopened discovery and al supra provides that parties are not entitled to discovery even for purposes of uncovering alleged fraud.

Post-trial discovery to attack a verdict is not appropriate under Federal law. In fact, the discovery rules are not applicable to post-trial procedures. As will be

discussed hereunder, the 10th Circuit has specifically provided that our courts do not have jurisdiction to supervise post-trial discovery after final judgment.

The only law that appears to exist that references similar situations such as defendant's efforts to obtain post-trial discovery provides that post-trial discovery is prohibited. *Public Citizen, et. al. v. Liggett Group, Inc., et. al.*, 858 F.2d 775 (1st Cir. 1988) In that case, the court ruled that because the Court had already entered judgment that left no substantive issue unresolved, the Court simply lacked power to impose any new affirmative requirements on the parties relating to discovery.

The Court noted that the purpose of discovery is to enable the parties to obtain material "which is relevant to the subject matter in the pending action". The Court stated that such purpose can no longer be served after the disposition of the case. *Public Citizen* specifically stated that the Court lacked power to impose new discovery related obligations after disposition of the case. *Id.*, at 783.

In that case, the specific issue was the Court's jurisdiction or power to issue discovery related orders following disposition of the case. The First Circuit vacated the order of the District Court finding that after the court had disposed of the case it did not have authority to impose any affirmative requirement on the parties relating to discovery. The court stated:

> With respect to the filing aspect of the court's order, we believe that by the time the district court acted on January 28, 1988, it lacked the power to impose such new requirements on the parties. Accordingly we vacate that part of the district court's order.
>
> Our reasoning is simple. The district court's judgment of October 6, 1987, was a final dismissal on the merits, concluding the litigation between the Palmers and Liggett. It

> left no substantive issue unresolved and it contained no provisions for equitable relief that would have required ongoing supervision by the district court. Under these circumstances, we think that the court simply lacked power to impose any new, affirmative requirements on the parties relating to discovery. *Id.* at 781.

Although the District Court is granted discretionary powers in supervising discovery, such discretion is only applicable before trial. *Ross v. Bolton*, 106 F.R.D. 22(D.C.N.Y. 1985)

For example, in *Central Bank of Tampa v. Trans-America Ins. Group.*, 128 F.R.D. 285 (N.D.Fla. 1989), the Court ruled that a party was not entitled to take a post-judgment deposition.

The ruling of *Public Citizen* was followed by the Tenth Circuit in *United Nuclear Corporation v. Cranford Insurance Company, et. al.*, 905 F.2d 1426 (10th Cir. 1990) The 10th Circuit ruled that when the underlying controversy is no longer alive, the Court lacks power to impose any new affirmative requirements on parties relating to discovery. In this case, the jury entered a verdict and the Court disposed of post-trial motions. Therefore, the underlying case had been concluded and the Court lacked jurisdiction, authority or power to impose any new affirmative requirements on plaintiff relating to discovery.

In 1995, the 10th Circuit again reiterated the ruling that after the litigation between the parties is resolved and no substantive issue remains unresolved, the Court lacks jurisdiction to impose discovery requirements on the parties. *Young v. Shilaos*, 35 F3d 441, 195 WL 12003(10th Cir. (Utah)) The court also made it clear that a final order is an order that ends the litigation on the merits and leaves nothing for the Court to do except execute upon the judgment.

In this case, there was a verdict, the Court entered judgment and disposed of post-judgment matters. Therefore, the order of the Court was a final order. Under *Public Citizen* which was followed by the 10th Circuit, the District Court could not have imposed any additional discovery duties upon plaintiff.

Defendant's discovery request was made three days after a verdict had been rendered. However, even if defendant's request for discovery had come just prior to trial, it would have been untimely. Our courts have devised a specific test to determine the timeliness of a discovery request. The Tenth Circuit has allowed parties to reopen discovery only in unusual circumstances, and never **after a verdict has been rendered.**

The following factors are considered in determining the appropriateness of reopening discovery: (1) whether trial is imminent; (2) whether the request is opposed; (3) whether the non-moving party would be prejudiced; (4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court; (5) foreseeability of the need for additional discovery in light of the time allowed for discovery by the Court; and (6) the likelihood the discovery will lead to relevant evidence. *Ropfogel v. United States*, 138 F.R.D. 579, 585 (D.Kan. 1991); *Sil-Flo, Inc. v. S.F.H.C., Inc.*, 917, F.2d. 1507, 1514 (10th Cir. 1990); *Smith v. United States*, 834 F.2d 166, 170, 169 (10th Cir. 1987)

Thus, under the unusual circumstances test, defendant is not entitled to re-open discovery if trial is imminent. It follows that there can be no discovery allowed after trial. However, even if the Court applies this test, defendant can not meet the necessary elements of the test. In this case, (1) The trial is not imminent but had already been conducted. (2) The request was clearly opposed. (3) Plaintiff would be greatly prejudiced by an unprecedented and dangerous procedure that would endangered the finality of all verdicts, and would further delay and increase the cost to plaintiff. (4) Defendant has no excuse for having failed, at the

appropriate time, to request the information it was seeking after trial. Defendant was simply not diligent in obtaining discovery within the guidelines established by the Court, and it cannot remedy its lack of diligence by reopening discovery after trial. To allow otherwise would prejudice plaintiff and reward defendant for its lack of diligence. (5) Defendant has never complained that it did not have sufficient time to conduct discovery. As such, the foreseeability of the need for additional discovery in light of the time allowed for discovery by the Court is not applicable. (6) Finally, there was no evidence whatsoever of the likelihood that post trial discovery would lead to relevant evidence.

In *Sanjuan v. IBP, Inc.*, Case No. 94-CV-1541-DES the court tried the case to a jury beginning June 30, 1999. The case concluded on July 13, 1999. Prior to the trial, defendant filed a motion seeking to compel plaintiff to provide a release for social security records. At a hearing prior to jury selection, the Court denied defendant's motion. In a post-trial motion, defendant raised the issue of Social Security release. The Court ruled, citing defendant's negligence in seeking to obtain such information during pretrial discovery. In the Court's Memorandum and Order of March 10, 2000, Judge Saffels ruled:

> Finally, IBP argues it was prejudicial error for the court to deny its motion to compel plaintiff to sign a release for social security records. IBP requested that the plaintiff sign a consent form fourteen days before trial. Sanjuan refused to sign the consent on June 23, 1999, claiming that the Social Security records request was untimely and not included in IBP's discovery requests. The defendant did not file a motion to compel until June 29, 1999, the day before trial. The deadline for discovery had expired, and IBP never sought to reopen discovery. IBP had

> more than three years to request the social security records, but chose to submit its request on the eve of the second trial. Any prejudice suffered by IBP is a direct result of IBP's own neglect to get their request before the court in a timely manner. (Supp. App. 142)

In *Sanjuan*, Judge Saffels ruled that defendant's request was too late some fourteen days prior to trial. In the present case, the same defendant requested that the release be signed three days after the verdict was rendered.

Incredible, and without any authority, Judge Thomas Marten ordered plaintiff to submit to post trial discovery to see if defendant could defeat the verdict. The motive appears clear. The 10th Circuit reversed the trial court regarding summary judgment and ordered a trial. A jury awarded damages to plaintiff and the trial court still wanted to take it away from plaintiff.

While it is true that prior to the trial, defendant made an informal request for plaintiff to provide documents regarding Mr. Rodriguez' social security benefits, that is all defendant did. Mr. Rodriguez had none, so he went to the Social Security office. The only document that the Social Security office in Topeka, Kansas gave him was the information about the amount of his benefits and when they commenced. This seemed to be enough for defendant. Defendant used this information to file a Motion in Limine. The trial Court granted the Motion in Limine, limiting Mr. Rodriguez economic damages to the months from the time defendant fired Mr. Rodriguez to the month that he began receiving Social Security benefits or $11,000.00. Upon defendant's insistence the parties stipulated to a limit on economic damages to $11,000.00. This was all that defendant sought prior to trial. Defendant did not seek any other information or documents regarding Mr. Rodriguez' Social Security benefits, until defendant lost at trial.

Therefore, as a result of plaintiff's inability to provide records about his social security benefits, the trial court sanctioned plaintiff by precluding him from claiming damages for more than six months. After the trial, the court again sanctioned plaintiff for the same inability to provide records and took away his verdict.

The Court punished plaintiff twice for the same inability to provide documents. This is analogous to a double jeopardy violation.

In its post-trial Orders, the District Court implied that defendant requested the Social Security release prior to the trial. The facts are that not once did defendant informally or otherwise asked for a social security release prior to trial. Three days after the jury rendered its verdict, defendant's counsel Brian Markley called plaintiff's counsel and asked for the first time for a release for plaintiff's social security records. He indicated that if plaintiff would sign a release for social security records, defendant could obtain the records the same day. Mr. Markley specifically indicated that defendant wanted to see if there was something that defendant could use to attack the verdict. It was apparent that defendant had simply not thought of requesting a release prior to trial. Apparently, after trial, defendant figured out that it could have obtained plaintiff's social security records almost immediately had defendant elected to conduct discovery. Plaintiff responded to defendant's request in a letter dated April 29, 1999, declining such request and citing the unprecedented nature of the request and the inappropriateness of the same.

The fact that defendant decided after trial that it should have obtained plaintiff's social security records, clearly indicates that defendant had made a strategic decision not to obtain the records prior to trial. Defendant even knew that it could obtain the records instantaneously. Therefore, a party that waits until the jury returns an unfavorable verdict to complain about what it could have done prior to trial is bound by that risky decision and should not be granted relief.

Instead, defendant chose to file an extensive Motion in Limine to preclude plaintiff from seeking damages beyond the period of time after which plaintiff began receiving social security benefits. The Court granted defendant's motion. Therefore, the only reason that defendant sought the records after the trial is because its choice of strategy proved ineffective and it lost at trial.

Defendant relied exclusively on its effort to persuade the Court to prevent plaintiff from presenting evidence of damages. Defendant was successful in its strategy since the Court granted defendant's motion to preclude plaintiff from claiming damages after the date in which plaintiff began receiving Social Security benefits.

Ironically, defendant blamed plaintiff for allegedly failing to provide a release, for which defendant never asked prior to trial. In a blatant misrepresentation of the record in this case, defendant blamed the Court for "Allowing plaintiff to proceed with this case after failing to provide even a release for the Social Security records . . ." and argued that the Court committed prejudicial error by allowing plaintiff to proceed with this case after failing to provide even a release for the Social Security records.

After the trial, defendant submitted into the record a blank Social Security application form to argue that it would have been important for it to know plaintiff's answers to the questions in the form. Again, this was a belated argument that was never made before, was not raised during trial and defendant appears to think that it could do a better job if given a second chance or in this case a third chance. Defendant never explained why it did not use the questions in the form to cross-examine plaintiff during trial. Defendant could have easily gone through each question in the form while examining plaintiff at trial. However, the record reflects that even at trial, defendant did not ask plaintiff a single question about his social security benefits.

If this issue was of such importance as defendant argued after trial, and of such crucial relevance, defendant totally failed to explain why it did nothing to address the social security issue prior to trial or during trial.

In this case, defendant did not take any action to procure discovery and therefore was not entitled to move to compel. Even if it is assumed for purposes of argument that defendant propounded discovery, and even if it is assumed that there was non-compliance by plaintiff, after the prescribed period of time within which defendant was required to move to compel, any discovery dispute was absolutely waived.

After discovery closed in this case, defendant could not have any reasonable expectations related to discovery.

> If plaintiff was hampered in examination by defendant's failure to produce particular documents at deposition, plaintiff should have raised the issue before the deposition was concluded, not two months after close of discovery, and thus, plaintiff could not compel production." *Krauss v. First City Nat. Bank and Trust Co.*, 125 F.R.D. 80, (S.D.N.Y. 1989).

Likewise, in this case, defendant was not entitled to any discovery after discovery closed.

It can not be emphasized enough that during the first five years of litigation in this case, defendant was entitled to and did conduct any and all discovery that it deemed necessary to defend the case. After the Court of Appeals remanded this case, the Court again reopened discovery and allowed defendant to do any and all discovery it deemed necessary. Defendant failed to even update plaintiff's testimony and therefore, any alleged lack of knowledge about any matter was caused by defendant's inaction or choice of strategy.

Instead of seeking discovery prior to trial, defendant strategically elected to preclude plaintiff from presenting evidence of damages beyond six months post termination. The Court granted defendant's motion. Defendant now complaints that it was prejudiced by its election of remedies. In *Lane v. Wal-Mart Stores, Inc.*, 199 WL 51808 (10th Cir. (Wyo.)), Wal-Mart appealed in part because of improper arguments made during closing arguments by Lane's counsel. During argumen's, Wal-Mart's counsel did not object. The 10th Circuit ruled that:

> A party who waits until the jury returns an unfavorable verdict to complain about improper comments during . . . closing arguments is bound by that risky decision and should not be granted relief.

Applying that rationale to this case, a party that waits until an unfavorable verdict to complain that the opposing party did not disclose information prior to trial is bound by the risky decision of proceeding to trial and can not be granted relief after trial. *Glen v. Cessna Aircraft Co.*, 32 F.3d 1462, 1465 (10th Cir. 1994)

Defendant was simply not entitled to post-trial relief with respect to any unresolved discovery issues unless defendant first asked for a continuance of the trial, and the court denied such request.

> Continuance is ordinarily the proper method for dealing with claim that there has been failure to disclose in timely manner. *Kane v. Parry*, 588 A.2d 227 24 Conn. App. 307 Appeal after review 608 A.2d 108, 27 Conn. App. 923 (Conn. App. 1991)

> Continuance serves to minimize possibly prejudicial effect of late discovery disclosure and absent such request by party claiming to have been prejudiced, appellate review of late discovery is not warranted. *Cleveland v. Policy Management Systems Corporation, et. al.*, 1999 WL 320795 (U.S.)*Rullo v. E.M. Motors Corp.*, 543 A.2d 279, 208 Conn. 74 (Conn. 1988)

In this case, defendant has admitted that it **never even** asked plaintiff for a release for his social security records until three days after the verdict in the case. Certainly, defendant did not ask for a continuance to obtain additional evidence. Therefore, under the law, the Court had no authority to order plaintiff to assist defendant's effort to defeat the verdict.

In its Memorandum and Order dated September 29, 1999, (Appendix F), the Court makes it sound as if the Court should have done discovery for defendant or that the Court had a duty to conduct discovery on behalf of defendant. In fact, plaintiff is shocked at the language of the Court that indicates:

> Following the trial, defendants (sic) continued to seek the records, at least in part to support claims of error in various rulings this court made over the course of the trial. (Appendix F)

The clear import of this language is that losing parties are entitled to post-verdict discovery for purposes of attacking a verdict. Such incredible proposition would spin the entire jurisprudential system on its head and destroy the concept of finality.

Importantly, the Court did not even require defendant to make a showing as to why it did not take any affirmative action to conduct the Social Security discovery prior to trial. In addition, the Court did not impose *any duty* upon defendant to make *any kind* of substantive showing as to what it expects to find in plaintiff's Social Security records. Most importantly, defendant should have been required to make a showing as to how such information would entitle defendant to relief from judgment. Relief from judgment requires an extremely high standard. In this case, even if the Court accepts defendant's unsupported arguments about possibilities, at best, defendant can show that perhaps it might find impeachment material in the records.

Under *Cleveland v. Policy Management Systems Corporation, et. al.*, 1999 WL 320795 (U.S.) claims of disability in a Social Security application constitute only impeachment evidence that the plaintiff is entitled to explain at trial. On the other hand, to obtain post-trial relief, defendant would be required to show that newly discovered evidence is not limited to impeachment evidence. As such, the Court did not subject defendant's request to any of the required legal tests.

The Court did not require defendant to show by clear and convincing evidence, that the contents of the documents would mandate a different outcome. Even if defendant comes up with impeachment material, such material would not entitle defendant to relief from judgment.

At best, defendant guesses that there may be information in plaintiff's Social Security records that may be inconsistent with his trial testimony. This is not a new argument, defendant made that argument about Social Security during trial. In addition, defendant made the argument that plaintiff testified inconsistently under oath in his worker's compensation case. Defendant also made the argument that plaintiff was disabled, unable to do his job and not entitled to prevail. The jury rejected all of these arguments.

Courts have ruled that a party is not entitled to discovery in connection with a post-trial motion.

> FDIC was not entitled to discovery on motion for reconsideration in action brought against former officers and directors of three banks which merged into one bank which was then declared insolvent, since FDIC offered no new evidence or reasons for allowing discovery. *Federal Deposit Ins. Corp. v. Former Officers and Directors of Metropolitan Bank*, 705 F.Supp. 505, reversed 884 F.2d 1304, certiorari denied Fed. R. App. P.4(a)(B)(ii) *U.S. Paccione* 964 F.2d 1269 (2nd Cir. 1995)à64 F.2d 1269*Thomas v. United States*, 835 F.2d 727 (9th Cir.1995)*United States v. Johnson*, 801 F.2d 597 (2nd Cir. 1986)*In re Hunt*, 754 F.2d 1290 (5th Cir. 1985)*In re Cordoba Gonzalez*, 726 F.2d 16 (1st Cir.1984), cert. Denied, 466 U.S. 951, 104 S.Ct. 2154, 80 L.Ed.2d 540 (1984)*Vacalis v. Shawmut Corp.*, 925 F.2d 34 (1st Cir. (Mass.) 1991)Fed. R. Civ. P. 37 contemplate fining a party $411,000.00 for failure to comply with a discovery order.

In sum, it seems preposterous that a court would order a party to submit to post-trial discovery for purposes of allowing an opponent to attack a verdict.

In essence, the 10th Circuit ruled that it did not matter that defendant failed to adequately pursue discovery, that defendant obtained relief at trial, that defendant failed to inquire abut the social security benefits, that defendant failed to file a motion to compel production of Social Security benefits information or an authorization. It did not matter that defendant failed to depose Mr. Rodriguez on this issue at

any time during the five years of litigation of this case. It did not matter that defendant failed to request an authorization for Social Security records until the next business day after the trial. It did not matter that the District Court found that defendant could have and should have acted with more diligence in this case.

All that mattered to the Tenth Circuit was that plaintiff **unintentionally** withheld information that plaintiff's counsel didn't know existed until ten days before the trial. The Court of Appeals ruled that Mr. Rodriguez had a duty to disclose information regarding his Social Security benefits during the original discovery process, even though Mr. Rodriguez doesn't speak or read English well and obviously didn't understand what defendant was asking for in 1994. The Tenth Circuit ruled that plaintiff's counsel had a duty to disclose information regarding Mr. Rodriguez' Social Security benefits during the original discovery process, even though plaintiff's counsel had no way of knowing that Mr. Rodriguez was receiving benefits.

Simply taking away a verdict of over half million dollars without substantive due process violates plaintiff's Fifth and Fourteen amendment right to due process. Plaintiff did nothing intentionally to warrant such unheard of punishment.

2. PLAINTIFF WAS ENTITLED TO APPEAL OR OBTAIN A RULING ON HIS MOTION TO STAY PRIOR TO HAVING TO COMPLY WITH THE POST TRIAL DISCOVERY ORDER.

The Court's order and the Clerk's judgment both filed on July 2, 1999, were final orders in this case. No issues were left unresolved. Therefore, the order of the District Court for Mr. Rodriguez to provide a signed Social Security authorization was appealable, unlike usual discovery orders which are issued during pending litigation.

Pursuant to Fed. R. App. P.4(a)(B)(ii) Mr. Rodriguez was entitled to appeal the final judgment of the court.

> (ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal–in compliance with Rule 3(c)–within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

Complying with the District Court's Order would have mooted plaintiff's appeal as to the validity of the post-trial discovery order and would have mooted Mr. Rodriguez' efforts to obtain a stay. In Cordero v. De Jesus-Mendez, 867 F.2d 1, 21 (1st Cir. 1989) the Court ruled that once a "contempt order has been complied with, no case or controversy remains," therefore any pending appeal becomes moot.

Whenever a District Court imposes sanctions against a litigant, the order for sanctions becomes immediately appealable. Depending on the nature of the Order, a party may still be required to comply with the Order of the Court. The test is whether complying with the Order of the District Court would moot the appeal. If the party is able to comply with the Order and still obtain relief, then compliance is required. However, if compliance would make it impossible to unring the bell so to speak, compliance is not required. *U.S. Paccione* 964 F.2d 1269 (2nd Cir. 1995); *Thomas v. United States*, 835 F.2d 727 (9th Cir.1995): *United States v. Johnson*, 801 F.2d 597 (2nd Cir. 1986); *In re Hunt*, 754 F.2d 1290 (5th Cir. 1985); *In re Cordoba Gonzalez*, 726 F.2d 16 (1st Cir.1984), cert. Denied, 466 U.S. 951, 104 S.Ct. 2154, 80 L.Ed.2d 540 (1984)

In addition, if the Court lacks jurisdiction to enter the Order or the Order is "transparently" invalid, a litigant does not have to comply with the Order and can seek to avoid contempt sanction by litigating on appeal the validity of the underlying order. *Vacalis v. Shawmut Corp.*, 925 F.2d 34 (1st Cir. (Mass.) 1991)

The Order entered by the District Court in this case is the type of Order which a party is not required to comply pending appeal. If Mr. Rodriguez complied with the Order of the Court, he would have been unable to obtain any relief on appeal. Mr. Rodriguez in essence would have had nothing to appeal and his appeal would have been moot. There is no way to "ungive" Mr. Rodriguez' Social Security records to defendant.

Therefore, the outcome of this case placed Mr. Rodriguez in a no win situation. If he complied, he mooted his appeals. Because he pursued his appeals, his judgment was taken away from him.

Despite the fact that plaintiff's research shows that the orders of the Court were stayed pending appeal, pursuant to appellate court rule Fed.R.App.P. 8, and out of an over abundance of caution, plaintiff sought an Order from the Court staying its Order of July 2, 1999 requiring plaintiff to provide defendant with a release for his Social Security records and the Order of the Court of October 13, 1999 imposing sanctions against plaintiff.

The logic for plaintiff's request was simple. Normally, staying an order would disrupt the orderly disposition of a **pending** case. However, there was nothing pending before the Court.

Ordinarily, a stay is not appropriate in a **pending case**. The reason is clear. A trial Court attempting to manage the disposition of a **pending** case, should not be burdened with the stay and the unavoidable delays that would be caused in the disposition of the case during the time needed to process an appeal. As to the appellate court, the rule precludes multiple appeals that can paralyze the

appellate process. In general, the rule prohibits piecemeal appeals while at the same time allowing the aggrieved party review once there is a final judgment. However, once there is a final judgment in a case, the rationale for prohibiting appeals from discovery orders is no longer applicable.

In this case, since the 10th Circuit Court of Appeals Ruled that the District Court had authority to order post-trial discovery in order to allow defendant the opportunity to attack the verdict, plaintiff was prepared to provide the release. However, the 10th Circuit also ruled that the Orders of the District court were not stayed, therefore, plaintiff's award from the jury has been taken away and the social security authorization is moot.

Plaintiff indicated that it stood ready at all times to comply with the post-trial discovery order if his motion to stay was denied. However, plaintiff was never informed that his motion to stay was denied. It was just assumed that the threatened sanction had automatically eliminated the verdict.

The Court of appeals ignored that the District Court never entered the threatened sanction. As such, if the Court of appeals would have specifically ordered plaintiff to provide the release, plaintiff would have complied. On the contrary, the Court of Appeals specifically indicated that plaintiff did not have to comply. Therefore, from the very beginning, the Court of Appeals assumed the District Court had actually entered the threatened sanctions. Likewise, if the District Court would have began to reduce the judgment, plaintiff would have immediately complied.

The acts or omissions of the Court of Appeals conjured up a situation where plaintiff never had an opportunity to comply. Most importantly, he was deprived of over half million dollars and the labor and industry of years of litigation all, without due process.

3. SANCTIONING PLAINTIFF $411,000.00 PLUS COSTS AND INTEREST FOR CHALLENGING A

POST TRIAL DISCOVERY ORDER IS UN-CONSTITUTIONALLY EXCESSIVE.

Even if the District Court was correct in determining that the final order of July 2, 1999 was not appealable and even if plaintiff's challenge to the post-trial discovery order was sanctionable, the sanctions threatened were completely unreasonable. Plaintiff should have been given an opportunity by the appellate court to comply with the discovery order.

In Fed. R. Civ. P. 37, regarding orders compelling discovery, sanctions range from prohibiting a party from introducing designated matters in evidence to requiring payment of reasonable expenses caused by the failure. In this case, defendant did not incur any cost since it was after trial that it made an informal request for a release. Rule 37 does not contemplate fining a party $411,000.00 for inability to comply with an informal request for a release after trial.

Moreover, plaintiff has been unable to locate a case in which a party to a valid dispute was sanctioned over half million dollars without such party even knowing that the sanctions were in motion.

Under 10th Circuit precedent, the type of sanctions concerning egregious, willful and reprehensible violations of discovery orders appear to be limited to a few thousand dollars to compensate the opponent for efforts to obtain discovery. For example, earlier this year, on March 29, 2001, the 10th Circuit in Iles v. AutoZone Stores, Inc., Case Nos: 00-2001 and 00-2011 (10th Cir. 2001) found that the District Court had found that "[i]t is undisputed that the defendant did not timely produce documents previously requested and that the manner of producing these documents was dilatory and, in fact many of the documents requested and ordered by the Court to be produced were not produced." Nevertheless, the Court of Appeals affirmed a discovery sanction of $2,885.00 . Plaintiffs argued that AutoZone's discovery abuses were so legion, that additional sanctions should have been awarded.

This is just an example of the manner in which Court's deal even with willful, repeated and egregious discovery violations, during the discovery process.

Therefore, the sanction threatened and assumed to have been imposed by the Court of Appeals was Draconian and violates basic principles of fairness emanating as far back as to the time of the Magna Carta.. Certainly, plaintiff was deprived of property without substantive due process.

The grossly excessive punishment of plaintiff for challenging the validity of an unprecedented order violates the most basic constitutional guarantee against arbitrary judicial behavior.

CONCLUSION

WHEREFORE, for the foregoing reasons plaintiff respectfully request that the court grant certiorari in this matter, reverse the court of appeals decision and reinstate Mr. Rodriguez' jury award.

Respectfully submitted,

McCULLOUGH, WAREHEIM & LaBUNKER, P.A.

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APPENDIX

OPINION SOUGHT TO BE REVIEWED:

Appendix A – Opinion of the United States court of Appeals for the Tenth Circuit filed March 14, 2001

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PASCUAL R. RODRIGUEZ,
Plaintiff-Appellee and Cross-Appellant,

v.

IBP, INC.,
Defendant-Appellant and Cross-Appellee.

No. 99-3287
No. 99-3288
No. 99-3325

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 94-CV-1168-JTM)

Kathy Perkins Brooks, of Stinson, Mag, & Fizzell, P.C., Kansas City, Missouri (Brian R. Markley of Stinson, Mag, & Fizzell, P.C., with her on the brief) for Appellant and Cross-Appellee.
David O. Alegria, of McCullough, Wareheim & LaBunker, P.A., Topeka, Kansas, for Appellee and Cross-Appellant.

Before **HENRY, MURPHY,** Circuit Judges, and **MILLS,** District Judge.*

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*Honorable Richard Mills, District Judge, United

States District Court for the Central District of Illinois, sitting by designation.

MURPHY, Circuit Judge.

I. INTRODUCTION

Plaintiff Pascual R. Rodriguez sued his employer, IBP, Inc., for retaliatory discharge. Rodriguez prevailed on his retaliation claim at trial. Following entry of judgment, IBP filed a motion for judgment as a matter of law and, alternatively, a new trial. The district court denied IBP's post-trial motions, simultaneously ordering Rodriguez to provide a signed release of his Social Security records. Rodriguez failed to comply with the district court order and was subsequently found in contempt and sanctioned for his noncompliance. The case comes before this court on IBP's appeal of the district court's denial of its motions for judgment as a matter of law and new trial, and Rodriguez's cross-appeal of the district court's order requiring him to provide a signed release of his Social Security records and the contempt order for his failure to provide the release. This court exercises jurisdiction pursuant to 28 U.S.C. §§ 1291 and **affirms** both the portion of the district court's July 6, 1999, order requiring Rodriguez to provide the signed release and its subsequent contempt order. IBP's appeal is **dismissed** as moot.

II. BACKGROUND

Rodriguez began working for IBP at its Finney County, Kansas plant in 1985. On April 6, 1990, he was injured at work when a co-worker struck his elbow with a heavy bucket. Unable to perform his usual job as a whizard knife operator, Rodriguez worked in a series of light-duty jobs for nearly two years. In January 1991, he initiated his worker's compensation claim. In January 1992, Rodriguez claimed he could not perform light-duty work. IBP allowed

Rodriguez to call in daily to inform the company whether he was going to work on each particular day. In May 1992, Rodriguez stopped calling and IBP terminated his employment.

In May 1994, Rodriguez filed a complaint against IBP, alleging the company terminated him in retaliation for exercising his rights under the Kansas Workers' Compensation Act. IBP claimed Rodriguez was terminated for violating its no call/no show policy. IBP also argued that Rodriguez was physically unable to perform his regular-duty position on the day of his termination, thereby barring a worker's compensation retaliatory discharge claim under Kansas law.

IBP filed a motion for summary judgment, which was granted by the district court. Rodriguez appealed, and this court reversed the district court's grant of summary judgment. *See Rodriguez v. IBP*, No. 96-3159, 1998 WL 426797, at *4 (10th Cir. July 20, 1998) (unpublished disposition). The case was remanded and set for trial. Three weeks before trial, the parties participated in court-ordered mediation. During the mediation, IBP learned for the first time that Rodriguez was receiving Social Security disability benefits. IBP requested the immediate production of materials related to Rodriguez's disability benefits. The only material Rodriguez ever turned over to IBP was a record of payment.

IBP subsequently filed a motion *in limine*, seeking to exclude from trial evidence of Rodriguez's alleged economic loss and to bar submission of economic damages to the jury. At the *in limine* conference, counsel for Rodriguez indicated that he would produce the information regarding his client's Social Security benefits as soon as he obtained it. On the third day of trial, IBP renewed its motion *in limine* because Rodriguez failed to give it information regarding the basis for

his disability determination by the Social Security Administration. Rodriguez's counsel indicated that his client's Social Security benefits entitlement date was November 1992. The district court granted IBP's motion *in limine*, in part, limiting pecuniary damage evidence to the period between Rodriguez's termination date and the date he became totally disabled.

At the close of Rodriguez's case-in-chief, IBP moved for judgment as a matter of law. It argued there was insufficient evidence to prove Rodriguez was able to return to the whizard-knife position on the date of his discharge or anytime after. The district court denied the motion. The jury subsequently returned a verdict for Rodriguez, awarding him $411,000. The district court entered judgment on April 26, 1999.

Although IBP had not yet filed its renewed motion for judgment as a matter of law and its alternative motion for a new trial, IBP filed a memorandum on May 10 in support of its motions. IBP also requested an order requiring Rodriguez to provide a release for his Social Security records in the event it denied IBP's post-trial motions so that IBP could file a motion for relief from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure. On May 11, IBP filed a motion seeking leave to file its motion for judgment as a matter of law one day late. On May 14, the district court entered orders deeming IBP's memorandum to be its motion and denying its motion to file out of time as moot. On July 6, the district court denied IBP's post-trial motions for judgment as a matter of law and new trial, but ordered Rodriguez to provide IBP with a signed release for all of his Social Security records within ten days. IBP subsequently filed a notice of appeal from the district court's final judgment and its denial of IBP's post-trial motions.

On July 16, 1999, Rodriguez filed a motion to amend the judgment solely with respect to the portion of the court order requiring a signed release for the Social Security records. On August 24, the district court denied Rodriguez's motion, giving him ten days to comply with the court order. On September 7, Rodriguez filed a notice of cross-appeal from the district court's July 6 order.

Rodriguez failed to provide the release by the deadline specified in the district court's August 24 order. On September 30, the district court ordered Rodriguez to appear and show cause why he should not be held in contempt. Rodriguez responded to the order with a written explanation. On October 13, the district court found Rodriguez in contempt, "having willfully refused to comply with a lawful court order to provide the Social Security records or a release to obtain the records to defendant." To ensure compliance with the court's previous orders, the district court ordered a reduction in the amount of the original judgment by ten percent in the event Rodriguez failed to submit three signed, unconditional releases to the court prior to October 28. The court ruled that for each subsequent business day in which the releases were not submitted it would remit the remainder of the judgment by five percent of the original judgment. In addition, the district court denied Rodriguez's request for a stay of the July 6 order.

On October 14, Rodriguez filed a notice of appeal from the district court's October 13 order. On October 26, Rodriguez filed a motion to stay the contempt order in the district court pending his appeal to this court. That motion was denied. Rodriguez filed a motion to stay in this court on December 1, which was denied because the $411,000 judgment had been reduced to zero.

Both IBP and Rodriguez filed motions to dismiss each

other's appeals. This decision disposes of Rodriguez's motion to dismiss IBP's appeal, IBP's motion to dismiss Rodriguez's cross-appeal, and the following consolidated appeals: IBP's appeal of the district court's denial of its motions for judgment as a matter of law and new trial; and Rodriguez's cross-appeals of the district court's order requiring him to sign a release for his Social Security records and its October 13, 1999, contempt order.[1] In its appellate brief, IBP indicates that this court need not consider its appeal if we affirm the district court's contempt order. Because we affirm both the district court's order requiring Rodriguez to provide a signed release and its contempt order, we dismiss IBP's appeal as moot.

III. DISCUSSION

A. Jurisdictional Issues

Both IBP and Rodriguez filed motions to dismiss the other party's appeal on jurisdictional grounds. Rodriguez claims this court does not have jurisdiction over IBP's appeal because it failed to timely file its post-trial motions, which in turn rendered its notice of appeal untimely. IBP argues this court does not have jurisdiction over Rodriguez's appeal of the court order requiring Rodriguez to provide a release for his Social Security records because discovery orders are not final, appealable orders within the meaning of 28 U.S.C. §§ 1291. This court denies both motions.

1. Rodriguez's Motion

Rodriguez argues the memorandum IBP filed on May 10, 1999, did not constitute a Rule 4(a)(4) motion and,

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[1]We also dispose of two other motions. IBP filed a motion pursuant to 10th Circuit Rule 30.1, seeking to include certain items in its appendix. Rodriguez filed a motion to supplement his appendix. Both motions are granted. Notably, the Social Security Benefit Statements included in Rodriguez's supplemental appendix do not provide this court with any conclusive evidence as to when he first began receiving disability benefits.

accordingly, did not toll the time to appeal. *See* Fed. R. App. P. 4(a)(4) (providing that time to file appeal runs from entry of order disposing of motion under Rules 50 and 59 of Federal Rules of Civil Procedure). He argues the district court treated IBP's memorandum as a post-trial motion in order to circumvent the clear language of Rule 6(b) of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 6(b) (prohibiting an extension of time for taking action under Rules 50(b) and 59(b)).

This court has the authority to construe a motion for extension of time within which to file a notice of appeal as the functional equivalent of a notice of appeal. *See United States v. Smith*, 182 F.3d 733, 736 (1999). In determining whether to treat the motion as a notice of appeal, we examine whether the moving party intended to seek appellate review and whether it provided sufficient notice to the parties and courts. *See id.* at 735. It follows, by analogy, that the district court may treat IBP's Memorandum in Support of Its Renewed Motion for Judgment as a Matter of Law and Its Alternative Motion for a New Trial as motions under Rules 50(b) and 59(b) if each accomplishes the same end as would a motion itself.

IBP's memorandum plainly indicates IBP's intent to file post-trial motions. Further, the memorandum complies with the requirements regarding the proper form of a motion. *See* Fed. R. Civ. P. 7(b). The memorandum renewed IBP's request for judgment as a matter of law and, alternatively, a new trial. *See id.* 50(b), 59(b). It specifies the judgment sought and articulates the law and facts on which IBP seeks relief. *See id.* 50(a)(2). It states with particularity the ground for IBP's motion and sets forth its requested relief. *See id.* 7(b). This court concludes the district court's treatment of IBP's memorandum of support as a timely filed motion for post-trial relief was proper.

Rodriguez further challenges this court's jurisdiction over IBP's appeal by claiming IBP failed to comply with the required contents of a memorandum under the local rules. *See* D. Kan. R. 7.6(a). He claims IBP's post-trial memorandum did not contain a statement of the nature of the matter before the court, a statement of the facts supported by references to the record, or a statement of the questions presented. Rodriguez does not indicate, however, how the district court abused its discretion in accepting IBP's memorandum despite its deficiencies under the local rules, nor does he indicate how a district court's misapplication of local rules deprives this court of appellate jurisdiction. This court will not make arguments for Rodriguez that he did not make himself. *Cf. Phillips v. Calhoun*, 956 F.2d 949, 953-54 (10th Cir. 1992) (holding this court need not consider a party's claim that is unsupported by legal argument and authority). Thus, Rodriguez's argument fails.

Because IBP's memorandum was filed within the time set forth in Rules 50 and 59 of the Federal Rules of Civil Procedure, the time to file a notice of appeal was tolled. IBP's subsequent motion in the district court to extend the time to file an appeal and its subsequent appeal to this court were timely. Accordingly, Rodriguez's jurisdictional challenge is without merit.

2. IBP's motion

IBP challenges this court's jurisdiction over Rodriguez's appeal from the July 6 order requiring him to release his Social Security records. IBP asserts the order is not final within the meaning of 28 U.S.C. §§ 1291 because it is a discovery order. Under 28 U.S.C. §§ 1291, this court has jurisdiction over all final orders of the district court. A final order "ends litigation on the merits and leaves nothing for the district court to do but execute the judgment." *Hooker v. Cont'l Life Ins. Co.*, 965 F.2d 903, 904 (10th Cir. 1992).

Discovery orders generally are interlocutory and not immediately appealable. *See Fed. Trade Comm'n v. Alaska Land Leasing, Inc.*, 778 F.2d 577, 578 (10th Cir. 1985). This case, however, involves a post-trial discovery order. If we accept IBP's argument, a post-trial discovery order would never be appealable until a party complies. Because such an event may never occur, this cannot be the rule. The order became final and non-interlocutory at the very latest when Rodriguez was sanctioned for not complying with the post-trial discovery order.

B. Court Order to Provide Release of Social Security Records

After the district court entered judgment on the jury's verdict, IBP sought post-trial relief in which it renewed its motion for judgment as a matter of law and, alternatively, sought a new trial. IBP asked the court to order Rodriguez to provide a release for his Social Security records if the court denied IBP's post-trial motions. In its July 6, 1999, order, the district court denied IBP's motions but ordered Rodriguez to "deliver to [IBP] a signed release for all Social Security records within ten days." Rodriguez argues the district court did not have the authority to issue this order. This court reviews the order to release the Social Security records for an abuse of discretion. *See GWN Petroleum Corp. v. Ok-Tex Oil & Gas, Inc.*, 998 F.2d 853, 858 (10th Cir. 1993).

Rodriguez indicated during pre-trial mediation that he was receiving Social Security disability benefits. Based on this disclosure, IBP filed a motion *in limine* to limit Rodriguez's claim for economic damages. At the *in limine* hearing, Rodriguez's counsel indicated that his client was in the process of gathering the information regarding his determination of disability. The district court reminded Rodriguez that the information was "at least constructively within his care, custody and control." Rodriguez's counsel

represented to the district court that "as far as the information is concerned, as soon as I get my hands on that information, which I have been trying to obtain, I will get it and put it in [IBP] counsel's hands and find out anything that I need to find out." Rodriguez's counsel also specifically indicated he would obtain the information regarding Rodriguez's disability status. The district court postponed its ruling, awaiting the provision of the information to IBP.

On the first day of trial, Rodriguez provided IBP with documents showing he began drawing disability benefits sometime in 1992. Because he did not provide records indicating the basis of his disability determination or the exact date when he began drawing benefits, IBP renewed its motion *in limine* on the third day of trial. IBP asked the court to limit economic damages to a specific time frame, from Rodriguez's termination date up to the date on which Rodriguez was declared disabled for Social Security purposes. Rodriguez's counsel only indicated his client began receiving benefits in November 1992. The district court granted IBP's motion, limiting economic damages to the period of time from Rodriguez's termination until around November 1992. Later that day, however, Rodriguez testified that he may have begun receiving Social Security disability benefits in September 1992.

IBP argues Rodriguez's Social Security records touch on the central issue of whether Rodriguez was in fact physically unable to perform the whizard knife job on his May 14, 1992, termination date, and therefore correspondingly unable to claim retaliatory discharge for invoking worker's compensation rights.[2] IBP contends that

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[2]Rodriguez claims the district court failed to require IBP to show how the Social Security records would entitle it to relief from judgment. This was already quite clear to IBP and the district court, however, and should have been clear to Rodriguez. Whether Rodriguez was permanently disabled at

because Rodriguez testified he began receiving benefits in September 1992, he must have represented himself as, and been determined to be, unable to perform the whizard knife job even before his May 1992 termination. *See* 42 U.S.C. §§ 423(a)(1)(D), (c)(2) (providing that a disabled individual is not entitled to disability insurance benefits until the first month after a five-month period during which he has been under a disability).

Although it may appear that the release of Rodriguez's Social Security records would have no impact in light of the district court's denial of IBP's post-trial motions, the district court obviously found the records significant for the purpose of Rule 60(b) relief. IBP specifically requested the release for this reason. The district court granted IBP's request, even though it denied its motions for judgment as a matter of law and, alternatively, a new trial.

Nonetheless, Rodriguez makes several arguments to support his claim that the district court had no authority to issue the order to sign a release. He first argues the court order "violates all discovery rules." It was Rodriguez, however, who violated the discovery rules by not making mandatory pre-trial disclosures under Rule 33(b)(1) of the Federal Rules of Civil Procedure. IBP's first set of interrogatories included a request for Rodriguez to disclose "each and every lawsuit, claim, or administrative proceeding to which plaintiff has ever been a party, including the court or agency where filed, the adverse party or parties, the date filed, the date dismissed or closed, and the nature of the claim(s) asserted." In his response, Rodriguez failed to disclose information about the proceeding before the Social Security Administration which resulted in his receipt of disability benefits.

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the time of his termination is highly relevant to his retaliation claim.

At oral argument, Rodriguez's counsel claimed he was unaware his client was receiving Social Security benefits until the pre-trial mediation three weeks before trial, the same time IBP learned of the benefits. This does not excuse Rodriguez's failure to disclose the information. Even if the ignorance of Rodriguez's counsel was an excuse, which it is not, Rodriguez fails to recognize that he had a continuing duty to supplement his disclosures upon learning that the information he disclosed in the interrogatories was incomplete. *See* Fed. R. Civ. P. 26(e)(2). Although the district court found that Rodriguez did not intentionally withhold information about his disability benefits, this finding does not excuse him from his continuing duty to disclose.

After Rodriguez's testimony, IBP could have asked the district court for a continuance of the trial. It did not. IBP's failings, however, do not excuse Rodriguez's continuing violation of his duty to disclose the information regarding his Social Security benefits.[3] Rodriguez repeatedly failed to follow the district court's instructions to provide information regarding his disability determination.

Rodriguez claims that because IBP strategically decided to pursue a motion *in limine*, rather than some other course, it cannot now claim it was prejudiced by that choice. IBP's motion *in limine*, however, was based on the available information it had at the time, which did not establish Rodriguez's disability date prior to his termination. It was not until trial when Rodriguez testified that he began receiving disability benefits in September 1992 that IBP had reason to believe Rodriguez had been determined to be disabled before

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[3]IBP's failings, however, did hurt it during the district court's review of IBP's post-trial motions. The district court indicated that IBP's lack of diligence contributed to its decision to deny IBP's motion for a new trial.

his termination date.

Rodriguez specifically claims IBP is prohibited from seeking post-trial discovery by its failure to seek a continuance of the trial or to file a motion to compel. IBP pursued discovery by seeking the relevant information in its interrogatories. While IBP could have been more aggressive, we find no authority in this circuit to support Rodriguez's claim and do not view these facts as compelling the creation of such authority.

Rodriguez also contends the district court did not have jurisdiction to issue the order to release the Social Security records because final judgment had been entered.[4] Control of discovery, however, lies in the sound discretion of the district court. *See Martinez v. Schock Transfer & Warehouse Co.*, 789 F.2d 848, 850 (10th Cir. 1986). Despite Rodriguez's suggestions otherwise, we find nothing in this court's authority indicating that this discretion ends upon the completion of the trial and before a notice of appeal has been filed. Rodriguez had a duty to disclose information regarding his Social Security benefits during the original discovery

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[4]In connection with this argument, Rodriguez claims the discovery rules are not applicable to post-trial procedures and that post-trial discovery is prohibited. Rodriguez relies on the First Circuit's decision in Public Citizen v. Liggett Group, Inc., 858 F.2d 775 (1st Cir. 1988), to support this proposition. Public Citizen involved an attempt by a non-party to intervene and force the actual parties to file all discovery materials in court following dismissal of the case. See id. at 778-80. The district court's order in Public Citizen was not related to a party's continuing duty to disclose information to another party, as is the case here. See id. at 781. Rodriguez also incorrectly relies on this court's decision in United Nuclear Corp. v. Cranford Insurance Co. to support his argument. United Nuclear Corp., however, involved a collateral litigant's attempt to intervene in order to gain access to discovery subject to a protective order. See 905 F.2d 1424, 1427 (10th Cir. 1990). Rodriguez has pointed to no authority to support his claim. Accordingly, his argument fails.

process. Rodriguez's attempt to characterize the district court's order as a reopening of discovery belies the Federal Rules of Civil Procedure. Rodriguez had a continuing duty to disclose information regarding his Social Security benefits even after discovery closed. *See* Fed. R. Civ. P. 26(e)(2). Moreover, the district court's order to sign the release coincided with its final judgment on the merits, and was entered before the district court lost jurisdiction over the case.

Rodriguez further claims the district court did not have jurisdiction to order the release because 42 U.S.C. §§ 1306(a) prohibits the disclosure of information about an applicant for Social Security benefits. Rodriguez misconstrues this statute. This provision of the Social Security Act prohibits disclosure by employees of the Department of Health and Human Services. *See* 42 U.S.C. §§ 1306(a) ("No disclosure of any . . . record . . . obtained at any time by the Secretary or by any officer or employee of the Department of Health and Human Services in the course of discharging the duties of the Secretary under this chapter . . . shall be made except as the Secretary may by regulations prescribe. . . ."). The law does permit an individual to consent to the disclosure of his record. *See* 42 U.S.C. §§ 1306(b); 20 C.F.R. §§ 401.100(a). The district court had the authority to order Rodriguez to provide this consent.[5] *Cf. United States ex rel. Woodard v. Tynan*, 776 F.2d 250, 252 (10th Cir. 1985) (en banc) (holding federal district courts have authority to order defendants to request release of their records from parties maintaining them so defendants can comply with discovery obligations).

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[5]Rodriguez claims the Social Security Administration regulations do not allow a district court to order the release of Social Security records. The regulation governing orders from the court, however, does not apply in this case because the order directed Rodriguez to sign a release. The district court did not order the Social Security Administration directly to release the records. See 20 C.F.R. §§ 401.180.

Throughout this litigation, Rodriguez has ignored his responsibility to turn over information regarding his Social Security disability benefits. He blames IBP for not seeking the release before trial, completely disregarding his counsel's numerous representations to the district court that he would turn over the information. In light of Rodriguez's failure to comply with his continuing duty to disclose under Rule 26(e)(2) and the possibility of Rule 60(b) relief, this court concludes the district court did not abuse its discretion in ordering Rodriguez to provide a signed release for his Social Security records.[6]

C. Contempt Order

A district court may exercise broad discretion in using its contempt power to assure compliance with its orders. *See Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 84 F.3d 367, 370 (10th Cir. 1996). This court reviews a district court's exercise of its discretion for abuse of discretion. *See O'Connor v. Midwest Pipe Fabrications, Inc.*, 972 F.2d 1204, 1209 (10th Cir. 1992). "Abuse of discretion is established if the district court's adjudication of the contempt proceedings is based upon an error of law or a clearly erroneous finding of fact." *Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d 372,

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[6]Rodriguez also claims IBP had no legal basis to include a request for post-trial discovery in its Rule 59 and 60 motions and that IBP was not entitled to use information obtained during a settlement conference to procure a favorable ruling that precluded Rodriguez from presenting evidence of damages. This court need not consider these arguments, however, because Rodriguez fails to support them with any authority. See Phillips v. Calhoun, 956 F.2d 949, 953-54 (10th Cir. 1992); Fed. R. App. P. 28(a)(9)(A) ("the argument . . . must contain appellant's contentions and the reasons for them, with citations to the authorities . . . on which the appellant relies."). Rodriguez also asserts a privacy right in his Social Security records based on an Eleventh Circuit decision. The Eleventh Circuit case, however, contains no discussion of a privacy right and does not support his assertion. See Perry v. State Farm Fire & Casualty Co., 734 F.2d 1441, 1447 (11th Cir. 1984). Accordingly. his argument fails.

375-76 (10th Cir. 1996).

Rodriguez argues on appeal that the district court abused its discretion because the underlying court order requiring the release of his Social Security records was unlawful. He further argues that because the district court did not have jurisdiction to enter the order, it did not have jurisdiction to enforce it. This court has already determined *supra* that the district court had the authority and jurisdiction to order Rodriguez to provide a signed release.

The district court furthermore had the authority to sanction Rodriguez for not complying with its order. *See United States v. Prof'l Air Traffic Controllers Org., Local 504*, 703 F.2d 443, 445 (10th Cir. 1983). The district court found Rodriguez in contempt beyond a reasonable doubt, a standard higher than required. *See id.* (holding "proof of contempt must be clear and convincing"). Rodrguez's belief that the discovery order was invalid did not excuse him from compliance. While the ultimate sanction negated Rodriguez's money judgment, that did not render the sanction Draconian. The object of the sanction was to protect the truth-seeking procedures of discovery, and the plaintiff himself eschewed all opportunities to avoid the sanction. This court concludes the district court did not abuse its discretion in sanctioning Rodriguez for his continued failure to comply with its order to provide a signed release of his Social Security records.

IV. CONCLUSION

This court concludes the district court had the authority to order Rodriguez to provide a signed release of his Social Security records. Rodriguez's failure to comply warranted the district court's finding of contempt and imposition of sanctions. Accordingly, the district court's July 6 order, requiring the release of Rodriguez's records, and its subsequent contempt order are **AFFIRMED**. In light of this

holding, IBP's appeal is **DISMISSED** as moot.

OTHER RELEVANT ORDERS:

Appendix B – Judgment of the United States District Court for the District of Kansas filed April 26, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

PASCUAL R. RODRIGUEZ,)
Plaintiff,)
vs.) No. 94-1168-JTM
)
IBP, INC.,)
Defendant.)
)

JUDGMENT

This action came on for trial before the Court and a jury, Honorable J. Thomas Marten, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff Pascual R. Rodriguez recover of the defendant IBP, Inc. the sum of $411,000.00, with interest thereon at the rate as provided by law, and his costs of action.

IT IS FURTHER ORDERED AND ADJUDGED pursuant to the Memorandum Order filed February 9, 1999, and entered on the docket February 10, 1999, that the plaintiff's motion for reconsideration is hereby denied.

DATED at Wichita, Kansas this 26th day of April, 1999.

APPROVED:

J. THOMAS MARTEN, JUDGE

RALPH L. DeLOACH, CLERK

By Sue Smith
Deputy Clerk

Appendix C – Order of the United States District Court for the District of Kansas filed July 2, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

PASCUAL R. RODRIGUEZ,)
Plaintiff,)
)
vs.) No. 94-1168-JTM
)
IBP, INC.,)
Defendant.)
)

ORDER

Following a jury trial on plaintiff Pascual R. Rodriguez's action for workers compensation retaliation, the court entered judgment against defendant IBP, Inc. in the sum of $411,000.00. IBP has subsequently filed a motion which seeks in the alternative judgment as a matter of law or a new trial. The motion also seeks an order requiring plaintiff to produce a consent to release of his Social Security records. The Court has reviewed the motion and finds, with the exception of the relief last mentioned, it must be denied.

IBP argues the court should grant judgment in its favor since there was no evidence Rodriguez was able to perform the work of his old job. In addition, IBP argues that the court erred in (1) submitting jury instructions which separately stated the requirement that Rodriguez be able to perform his old job and stating the law relating to retaliatory intent, thereby allowing the jury "to consider the two issues independently," (Def. Memo. At 17); (2) failing to dismiss

the action after Rodriguez refused or failed to provide evidence relating to his Social Security disability claim; (3) allowing Rodriguez to present evidence of loss of his house and medical complications; (4) allowing Rodriguez to use an interpreter and hearing aid on direct but not cross-examination; (5) erred in allowing Rodriguez to submit evidence despite his violation of various rules and orders; and (6) erred in upholding the jury's verdict as to the amount of damages. Finally, in the alternative, IBP argues that, if the court does not grant a judgment in its favor or a new trial, it should at least order Rodriguez to provide a release for his Social Security records.

A party is entitled to judgment as a matter of law on an issue where there is no "legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed.R.Civ.P. 50(a)(1). Thus, the court may grant a motion seeking this relief "only if the evidence points but one way and is susceptible to no reasonable inferences which may support the opposing party's position." O.E.R., Inc. v. Hickerson, 880 F.2d 1178, 1180 (10th Cir. 1989). Judgment as a matter of law is appropriate if "the evidence so strongly supports an issue that reasonable minds could not differ." Ryder v. City of Topeka, 814 F.2d 1412, 1418 (10th Cir. 1987). In resolving the motion, the court will construe the evidence, and inferences based on the evidence, in the light most favorable to the moving party, and will not weigh the evidence, pass on the credibility of witnesses or substitute its judgment for the jury's. Magnum Foods, Inc. v. Continental Cas. Co., 36 F.3d 1491, 1501 (10th Cir. 1994). The motion will be denied if the evidence favoring the nonmovant's position was properly before the jury and was more than merely "a scintilla of evidence." Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1547 (10th Cir.1988).

There is no doubt but that the key thrust of IBP's

motion is the paucity of evidence that Rodriguez was able to perform his old, wizard knife job at the time of his termination. And there can be little doubt but that there was a substantial body of evidence - much of it coming from the plaintiff himself - that he could no longer perform that job. Indeed, it appears the only evidence that Rodriguez could perform that work is his own assertion to that effect: asked on direct examination at trial if he could perform his old job, Rodriguez responded "Old job, yes, I do, if they give it to me, but they don't have it available for me no more." (Tr. at 44).

The court grants that this assertion by the plaintiff stands in contrast to a considerable body of evidence, including plaintiff's prior admissions, that he was no longer able to perform the work of his old, wizard knife job. It is, however, sufficient under the circumstances of the case. As noted earlier, it is not the role of the court to weigh the evidence, or to determine the credibility of witnesses. This result is especially true in light of the Court of Appeals opinion reversing the prior award of summary judgment. The court previously granted summary judgment in this action on grounds substantially similar to that now presented by IBP - that the evidence in the case, including medical reports and admissions by Rodriguez himself demonstrated that he could no longer perform the wizard knife job. On appeal, the Tenth Circuit reversed, finding a jury question on the issue on the basis of Rodriguez's testimony, which the court acknowledged as ambiguous, in which he asserted his ability to perform his work. Rodriguez v. IBP, Slip op., No. 96-3159 (10th Cir. July 20, 1998). Since that was enough to require the matter to be tried to a jury, it must also be enough to support the jury's finding in favor of Rodriguez.

As to the arguments asserted by IBP in support of its motion for a new trial, the court finds that they are without merit. Motions for a new trial are committed to the sound

discretion of the trial court. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845, 850 (1984). A new trial will not be granted for errors which do not "affect the essential fairness of the trial." Id. at 553, 104 S. Ct. at 848. Such motions are not regarded with favor, and granted only with great caution. United States v. Kelley, 929 F.2d 582, 586 (10th Cir.), cert. denied, 502 U.S. 926 (1991). In reviewing a motion for a new trial the court views the evidence in the light most favorable to the prevailing party. Griffin v. Strong, 983 F.2d 1544, 1546 (10th Cir. 1993). A new trial based upon an error of law is unwarranted unless that error affects the substantial rights of the parties. Fed. R. Civ. P. 61. "The party seeking to set aside a jury verdict must demonstrate trial error which constitutes prejudicial error or that the verdict is not based on substantial evidence." White v. Conoco, Inc., 710 F.2d 1442, 1443 (10th Cir. 1983).

IBP's contention that the instructions were erroneous does not have merit. The court instructed the jury that "Proof of the defendant's retaliatory intent in terminating the plaintiff is an essential element of his claim." Instruction No. 15. The jury was also instructed that "Plaintiff has no claim for retaliatory discharge if, as a result of his work injury, he is no longer physically capable of performing his regular duty position with the defendant." Instruction No. 18. The court finds that the instructions accurately stated the law. Read as a whole, the instructions contain no error.

Further, the introduction of evidence relating to Rodriguez's loss of his home and medical complications were not erroneous, the court finds, since they were admitted only for the purpose of determining the plaintiff's mental suffering, and the jury's ultimate damage award was not unsupported by the evidence. As to the plaintiff's action in securing the interpreter who was present only for the direct examination, the court must note the absence of any

contemporaneous objection by IBP to proceeding to its cross-examination without an interpreter. In any event, the court finds that, although the absence of an interpreter made the cross-examination longer and somewhat more difficult, it did not fundamentally or significantly interfere with IBP's ability to cross-examine the witness. Finally, as to the argument that a new trial should be granted because counsel for plaintiff failed to disclose the materials relating to Dr. Albott's report and only listed Dr. Cruzado as a witness at the last minute, again, the court finds that IBP has failed to show any real prejudice. The materials relating to Dr. Albott's report were produced, if somewhat belatedly. Dr. Cruzado was not permitted to testify.

The court believes that Rodriguez's Social Security records should have been produced at an earlier date. However, the court does not believe that the remedy of a new trial is appropriate. According to IBP, Rodriguez's failure to respond to written discovery on the subject in 1995 led them to believe that, if he was receiving any disability benefits, they would have begun after 1995. IBP states that Rodriguez's counsel first confirmed he was receiving disability benefits on April 15 or 16, 1999. On the day of trial, it was revealed that Rodriguez first began receiving these benefits in 1992. According to IBP, counsel stated that benefits began in November. The only material turned over to IBP is a record of payment (which actually indicates benefits began in September of 1982). Finally, according to IBP, even after the trial, counsel for Rodriguez has still refused to consent to a release of the underlying Social Security records.

The court finds that a new trial is unjustified in light of several considerations. First, there is no indication that either the plaintiff or his counsel intentionally withheld information about the disability benefits. Second, prior to trial, IBP's Fourth Motion in Limine (Dkt. No. 88) raised the

issue. The only relief sought in the motion was for the court to exclude evidence of economic damages. The court limited any prejudice by favorably ruling for IBP by granting the significant sanction of precluding evidence of damages after the date of the disability benefits. Finally, there is also a basis for finding that IBP failed to quickly move out the truth about the benefits. IBP's Fourth Motion in Limine, which alleges that Rodriguez "withheld information about a social security disability determination" was filed on April 9, ten days before trial. There is no evidence in the record of any motion to compel on the issue. According to Rodriguez's response to the motion for new trial, IBP did not attempt to depose his client on the issue during the interim, or at any time after the remand of the case from the Court of Appeals. Moreover, according to plaintiff's counsel, IBP did not formally request a release of Social Security records until the day after trial. The court finds that IBP could have and should have acted with more diligence, and that a new trial now is unjustified under the circumstances of the case.

IT IS ACCORDINGLY ORDERED this 2d day of July, 1999, that the defendant's motion for judgment as a matter of law and other relief is hereby denied, except that plaintiff shall deliver to the defendant a signed release for all Social Security records within ten days of the date of this order.

J. THOMAS MARTEN,

JUDGE

Appendix D – Judgment in a Civil Case of the United States District Court for the District of Kansas file July 2, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

PASCUAL R. RODRIGUEZ,
Plaintiff, **JUDGMENT IN A CIVIL CASE**

V. CASE NUMBER: 94-1168-JTM

IBP, INC.,
Defendant.

Decision by Court. This action came before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
pursuant to the court's order filed July 2, 1999, that the defendant's motion for judgment as a matter of law and other relief is hereby denied, except that plaintiff shall deliver to the defendant a signed release for all Social Security records within ten days of this date.

Date: July 2, 1999 RALPH L. DeLOACH
Clerk
By RUTH THOMPSON
Deputy Clerk

Appendix E – Order of the United States District Court for the District of Kansas filed August 24, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

PASCUAL R. RODRIGUEZ, Plaintiff,	)	
vs.	)	No. 94-1168-JTM
IBP, INC., Defendant.	)	

ORDER

The court has reviewed the arguments presented by plaintiff in support of the motion to alter or amend the judgment, by which plaintiff seeks relief from that portion of the court's July 2, 1999 order requiring him to provide a release for his Social Security records. The court has also reviewed plaintiff's motion for extension of time to file a reply. The court finds that the requested extension shall not be granted, both because the matter has been addressed at length, and because the court considers the matter is not open to reasonable doubt.

Unlike the various cases cited by plaintiff in support of the motion to alter and amend, the present case does not involve an attempt to impose new discovery requirements in a long-dormant civil matter. The obligation to provide the evidence specified began prior to the trial of the matter, and a continuing duty remains. Plaintiff will provide a release for his Social Security records within ten days of the date of the

present order.

IT IS SO ORDERED this 24th day of August, 1999.

J. THOMAS MARTEN,

JUDGE

Appendix F– Memorandum and Order of the United States District Court for the District of Kansas filed September 29, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PASCUAL R. RODRIGUEZ, Plaintiff,)
vs.) No. 94-1168-JTM
IBP, INC., Defendant.)

MEMORANDUM AND ORDER

This matter is before the court on defendant's September 14, 1999 request to enforce this court's post-trial but pre-appeal order that plaintiff provide defendant a release for plaintiff's social security records. The court held a conference call with the parties on September 15, 1999, and the parties stated their positions. At the conclusion of the phone conference the court directed the parties to submit a short list of authorities (two to three pages maximum) to the court on or before Friday, September 17, 1999, addressing one issue: Whether or not the district court has jurisdiction to enforce its order of July 2, 1999, requiring plaintiff to provide to defendant the release for social security records.

Plaintiff has submitted a six-page memorandum which does not address the issue of concern to the court and cites Missouri, Illinois, Iowa and Maryland state law. Plaintiff does not cite a single federal case in his memorandum.

Defendant has submitted a two-page memorandum which does address the issue of the court's jurisdiction to enforce the order, but neither party has directed the court to a case squarely on point. The court's own limited research has also failed to uncover such a case.

As a starting point, defendant has been attempting to obtain plaintiff's social security records since before the trial. As contemplated by both the discovery provisions of the Federal Rules of Civil Procedure and D.Kan.Rule 37.2, defendant has made an effort to obtain these records without involving the court in what should be a routine matter. Before appealing the court's order at issue here, plaintiff's counsel offered explanation and apology for the difficulties he has encountered in attempting to provide the records to defendant, but whatever the reason, the fact remains plaintiff has failed to provide the records to defendant.

Defendant has consistently taken the position that it needed the social security records as a source of information regarding plaintiff's claim of disability or lack thereof in relation to his claim of retaliation. Because plaintiff's counsel assured the court that he was using appropriate effort to obtain the records, the court did not enter any orders to compel production or take any further coercive steps with respect to producing the records.

Following the trial, defendants continued to seek the records, at least in part to support claims of error in various rulings this court made over the course of the trial. The court believed and continues to believe defendant has a right to the records in question, and following the verdict for plaintiff ordered that plaintiff provide a signed release to defendant, authorizing release of plaintiff's social security records to defendant. In other words, because plaintiff was unable or unwilling for some reason to provide the records to

defendant, the court intended that defendant should be able to obtain the records directly.

The court has now decided all post-trial motions and the parties between them have appealed virtually every court ruling to the United States Court of Appeals for the Tenth Circuit. Of particular moment here, plaintiff has appealed this court's order that plaintiff provide a release for his social security records. In the meantime, plaintiff has refused to comply with the court's order, claiming this court is without jurisdiction to require compliance, and that the circuit now has exclusive jurisdiction over that matter.

This is a unique situation. As a general matter, discovery orders are not appealable. F.T.C. v. Alaska Land Leasing, Inc., 778 F.2d 577, 578 (10th Cir. 1985). On the other hand, that rule contemplates discovery orders as pretrial in nature, other than as part of standard post-trial matters such as proceedings in aid of execution.

There is no serious question but what the order requiring plaintiff to sign a release for the social security records would be unappealable had the order been entered during the pretrial discovery phase of the case. There is nothing about a verdict or post-trial motions which would inherently affect this court's jurisdiction to enforce such an order. As a result, this decision turns on what matters are left to the district court once a comprehensive appeal has been taken.

It is well-settled law that the district court retains jurisdiction over collateral matters even as an appeal is pending. Lancaster v. Independent Sch. Dist. No. 5, 149 F.3d 1228, 1237 (10th Cir. 1998); Bergeson v. Dilworth, 749 F.Supp. 1555, 1563 (D.Kan. 1990) (timely filing of a notice of appeal from a final judgment does not divest the district

court of jurisdiction over collateral matters not involved in that appeal"). A collateral matter is a matter not involved in the appeal. Garcia v. Burlington Northern R. Co., 818 F.2d 713, 721 (10th Cir. 1987). Collateral matters include the such rulings as the granting of attorney fees, Stewart v. Donges, 915 F.2d 572, 575 n.3 (10th Cir. 1990) (during appeal, district court retains jurisdiction over "tangential matters" such as attorney fees); also Harris Market Research v. Marshall Maketing and Communications, 948 F.2d 1518, 1526 n.3 (10th Cir. 1991) (attorney fees may be awarded by district court pending appeal as "a procedural and minsterial function"), and the award of sanctions for improper conduct. Missouri v. Coeur D'Alene Tribe, 164 F.3d 1102, 1107 n.3 (8th Cir. 1999), cert. denied, ____ U.S. ____, 119 S.Ct. 2400 (June 24, 1999); Gundacker v. Unisys Corp., 151 F.3d 842, 848 (8th Cir. 1998), and where necessary the exercise of the contempt power, Reed v. Rhodes, 472 F.Supp. 603, 605 (N.D. Ohio 1979) (despite pending appeal, district court "retains jurisdiction over the parties and the subject matter and may utilize its contempt powers to preserve its jurisdiction and the integrity of the letter and spirit of its orders"). This matter falls squarely within the definition of "collateral matter" and the court thus finds it has authority to enforce the order.

Additionally, the court finds this order to be a non-appealable discovery order in any event, which this court has the authority to enforce.

From a procedural standpoint, the court is now entering an order to plaintiff to appear and show cause why he should not be held in contempt of court for refusing to provide the signed release to defendant. Should the court find plaintiff in contempt, an appropriate sanction will be entered and that order will clearly be immediately appealable to the circuit.

As a final matter, the court fails to understand plaintiff's reluctance to provide the social security records to defendant months ago. Standing on what may or may not be sound legal principle once the verdict was reached neither excuses nor explains plaintiff's utter failure to provide defendant with access to clearly relevant records in a timely manner. This court shares great responsibility for this state of affairs for failing to issue a stern order requiring production well before trial rather than relying on the plaintiff's representations that the information would be provided to defendant. Among all the other reasons to enforce the court's order, assuming this court has jurisdiction to do so, it would simply be unfair to allow plaintiff to benefit from his own conduct in failing and now refusing to give defendant access to this information.

Based upon the court files and records in this case, as well as the representations of counsel in a September 15, 1999 conference call, it appears:

1. This court duly ordered plaintiff Pascual Rodriguez on or about July 2, 1999, to provide a signed authorization to defendant allowing defendant to obtain plaintiff's social security records;

2. Plaintiff has no provided such a signed authorization to defendant, although plaintiff has appealed the order.

IT IS THEREFORE ORDERED this 29th day of September, 1999, that the plaintiff Pascual Rodriguez appear before this court on October 12, 1999, at Wichita, Kansas, at 1:30 p.m. and show cause why he should not be held in contempt.

J. THOMAS MARTEN, JUDGE

Appendix G – Order of the United States District Court for the District of Kansas filed October 13, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PASCUAL R. RODRIGUEZ, Plaintiff,	)	
vs.	)	No. 94-1168-JTM
IBP, INC., Defendant.	)	

ORDER

Currently before the court is the repeated and willful. failure of the plaintiff Pascual Rodriguez to comply with the court's orders before and after the trial of his claim for retaliatory discharge against defendant IBP, Inc. In his response to the order to show cause, Rodriguez seeks to be excused from attending the hearing on the grounds tat he is suffering from stress and illness, and is bedridden. The response asks that "the Court accept this written response as his attendance at the hearing." (Resp. at 16). The court accepts this waiver of plaintiff's appearance.

The production of plaintiff's Social Security records touches directly on what was the essential fact question in the present case: the physical condition of the plaintiff in 1992. IBP terminated Rodriguez's unemployment on May14, 1992. Rodriguez contends that he was terminated in retaliation for obtaining workers compensation benefits, and at the time of his discharge he could still perform his traditional work

assignment. IBP has defended the case on the grounds that, at the time of the discharge, Rodriguez was physically unable to perform his job.

The court granted summary judgment in favor of IBP, stressing repeated comments by plaintiff in his deposition that he was no longer able to perform his job. The court of appeals reversed this decision, Rodriguez v. IBP, No. 96-3159, 1998 WL426797 (10th Cir. July 20, 1998) noting other statements by plaintiff in his deposition that he would have done his old job if he had been allowed to return to work. The court concluded that the evidence from the deposition was ambiguous, and that an issue of fact therefore existed as to whether Rodriguez was unable to perform his old job. 1998 WL 426797 at *3.

Upon remand, the matter was set for trial. However, shortly before trial, it was revealed that in 1992, only a few months after his discharge, plaintiff had applied for and began receiving benefits for total disability from Social Security. Prior to trial, the court required, and the plaintiff consented to, production of records reflecting his disability claim with the Social Security Administration. Those records have never been produced.

The matter proceeded to trial and Rodriguez obtained a judgment in his favor. When the court learned, during the course of the trial, that the Social Security records had still not been produced, it granted the pretrial motion of the defendant IBP which had the effect of limiting plaintiff's damages. However, in light of the advanced course of the trial, the court did not continue the matter until the records were produced. The court subsequently denied IBP's new trial motion which cited numerous alleged errors, but the court again ordered Rodriguez to produce the records. Plaintiff has refused to comply, arguing the court no longer

has jurisdiction to consider the matter.

The court has previously entered an order finding that it had jurisdiction to consider this matter, and requiring Rodriguez to show cause. The response to this order, filed by plaintiff the day before the scheduled hearing, is largely given over to a repetition of the argument that the court is without jurisdiction. The court rejects this argument, for reasons stated in its earlier order.

Also in his response, Rodriguez complains that the court at trial "practically instructed the jury that the plaintiff must lose his case," and now "is actively assisting defendant in an outcome determinative process." (Resp. at 2, 3) The court, Rodriguez states is taking "an advocacy position completely abandoning any resemblance of objectivity, impartiality, or fairness to plaintiff." (Id. at 12). The court has "gone out on a long limb for the defendant." (Id. at 14).[1]

Plaintiff's complaints are wholly unfounded. In its discretion, the court decided to consider the brief filed by defendant IBP arguing for a new trial, which was filed barely within the time allowed by the rules, as the functional equivalent of a motion asking for the relief sought. Rodriguez fails to note, however, *that the court then proceeded to deny the granting of a new trial.* Virtually every one of the many arguments advanced by IBP was

---

[1]The plaintiff also suggests that the court has acted improperly in order to reach the result of its earlier summary judgment ruling. The court must remind plaintiff that the summary judgment ruling in 1996 was rendered by the Honorable Patrick F. Kelly. After that decision, the matter was transferred to the undersigned, who first considered the matter in the context of plaintiff's motion for reconsideration. The court found that there was no newly discovered evidence or other basis under the rules for reconsidering Judge Kelly's decision. The undersigned has consistently attempted to apply the relevant law to plaintiff's claims in a just and impartial fashion.

rejected. The only qualification to this complete rejection of the litany of errors claimed by IBP was the specific order to plaintiff that he must (as he had agreed to do before trial) provide for production of his Social Security records.

Moreover, the court must note that the exaggerated sense of injury presented in plaintiff's response is as surprising as it is unfounded. During the earlier stages of this case, while Rodriguez (and IBP for that matter) certainly disagreed with various rulings of the court, in the end both parties complimented the court on the conduct of the trial. The vitriolic tone taken in the plaintiff's response is a complete and unfortunate departure from his previous presentations to the court.

Nor, the court must remind the plaintiff, is it involved in an "outcome determinative process." The court, and IBP, have no idea what relevant evidence, if any, is contained in plaintiff's Social Security records. Only plaintiff knows the contents of those records and whether they would determine any issues before the court.

Rodriguez consistently attempts in the response to create the suggestion that the requirement that he produce his Social Security records was a requirement suddenly placed upon him only after the trial. In this context, he complains that IBP never explicitly moved to compel the production of the records. The court must reject this suggestion. The requirement that Rodriguez produce his Social Security records was established before trial, was continued during the trial, and continues to this day. Rodriguez agreed to produce those records before trial and during the trial. What has changed, after the trial, is his insistence that it is beyond the jurisdiction of the court to require it.

IBP's fourth motion in limine was based on its

discovery at a settlement conference that Rodriguez was receiving total disability benefits from Social Security. The motion contended that it had never received any records reflecting these benefits, which would have obviously fallen within matters which plaintiff should have earlier produced, and sought the heavy sanction of excluding any recovery for certain economic damages.

At the April 16, 1999 hearing on in limine motions, Rodriguez explicitly agreed that the records were critically important in the action, and agreed with counsel for defendant

> that if he is unable to work as a result of work related injuries, he does not have a claim for retaliatory discharge; however, on the other hand, if he's unable to work as a result of the firing or the termination, then that would be elemental damages. So, I think we are in agreement on that.

(Tr. at 22). Rodriguez then affirmatively represented to the court that he was "in the process of gathering the information." (Id.)

Later in the hearing, Rodriguez suggested that some of the information concerning the claim may have been in the hands of lawyers other than his current trial attorney. The court explicitly reminded counsel for plaintiff that this did not excuse the requirement to produce the records:

> Mr. Rodriguez is your client, and that information is at least constructively within his care, custody and control, even if he has other lawyers that are handling it, and so the obligation is his to you and you to them. I'm assuming from what you're saying here that

> there are other lawyers that handled his social security disability claim, and I think Mr. Rodriguez needs to understand that he has an absolute responsibility to get that information and he's entitled to that information from his lawyers.

(Id. at 23).

The plaintiff responded that he would get the information concerning the disability benefits claim from other lawyers and that "[a]s soon as I get it, I'll provide it to her [defense counsel]." (Id. at 24). After IBP complained that this was insufficient in light of the impending trial, plaintiff repeated his assurances: "As soon as it came up, I have been trying to obtain it, and as soon as I get it I'll provide it." (Id. at 25).

The court observed that the matter was important:

> The difficulty, David, as I see it, we are now four days away from a trial that we scheduled months and months ago. I recognize that there was a mediation a few weeks ago in which apparently this issue of social security disability came up for the first time, almost by accident, during the course, and that seems to me to be a pretty significant issue. If he was determined to be totally disabled for purposes of social security disability, it means basically that he's unemployable and it certainly cuts off any damage claim that he might have with respect to lost wages.

(Id.) The court then stressed that getting information from

the Social Security Administration with a signed release "typically can be done fairly quickly." (Id. at 26).

Again, plaintiff assured the court that "we are getting that." (Id. at 27).

Based on these assurances made at the hearing, the court provisionally denied the motion to exclude economic damages, but noted that the matter was "an extremely significant issue from the standpoint of damages." (Id.)

In sum, the court explicitly held that Rodriguez had an "absolute responsibility" to obtain the Social Security records. Even apart from this requirement, the plaintiff's voluntary, affirmative representation to the court that he would obtain and produce the Social Security records created an obligation no less significant or burdensome than any order of the court. No additional motion or order to compel was necessary.

The extraordinary power to sanction contempt must be exercised with the utmost sense of responsibility and circumspection. Green v. United States, 356 U.S. 165, 188, 78 S.Ct. 632, 645, 2 L.Ed.2d 672 (1958). At the same time, when a contemptuous violation of an order of the court is demonstrated, the court is under an implicit obligation to grant appropriate and full relief to the injured party. McComb v. Jacksonville Paper Co., 336 U.S. 187, 193 (1948). The district court has broad discretion in fashioning coercive remedies to ensure compliance with its orders. N.A. Sales Co. v. Chapman Indus. Corp., 736 F.2d 854, 857 (2d Cir. 1984).

Civil contempt must be shown by clear and convincing evidence. However, the court finds here that the elements of contempt are present beyond any reasonable

doubt. Plaintiff knew of his obligation to produce the records, of the court's finding that he had the "absolute responsibility" to produce the records, of his explicit assurances to the court that the records would be produced, and of the court's subsequent order explicitly requiring presentation of a signed release by a date certain. The plaintiff had the ability to comply with these requirements. However, plaintiff has never complied, and has never offered any justification for that continuing failure. As to a matter of central importance in this matter, the inescapable conclusion is that the plaintiff is in contempt of court, having willfully refused to comply with a lawful court order to provide the Social Security records or a release to obtain the records to defendant.

In order to ensure compliance with the court's previous orders, and in light of the willful, persistent, and continuing evasion of those orders by plaintiff, the court will reduce the amount of the original judgment by 10% in the event that plaintiff fails to submit to the court prior to October 28, 1999 three complete, signed, unconditional releases of the records described herein. For each subsequent business day in which such releases are not submitted, the court will remit the remainder of the judgment by 5% of the original judgment. Plaintiff's request to stay these proceedings is denied.

IT IS SO ORDERED this 13th day of October, 1999.

J. THOMAS MARTEN,

JUDGE

Appendix H – Memorandum Order of the United States District Court for the District of Kansas filed November 10, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PASCUAL R. RODRIGUEZ, Plaintiff,	)	
vs.	)	No. 94-1168-JTM
IBP, INC., Defendant.	)	

MEMORANDUM ORDER

Currently before the court are two motions to stay matters in the present action. Defendant IBP has filed a motion to stay the $411,000.00 judgment in favor of plaintiff pending appeal. Plaintiff Pascual Rodriguez has filed a motion to stay judgment or in the alternative to seal release pending appeal.

IBP's motion is filed pursuant to D.Kan.R. 62.2, and is based upon its filing of a supersedeas bond in the amount of $513,750.00. Rodriguez has filed no response to this motion. The court hereby grants IBP's motion both on the merits and pursuant to D.Kan.R. 7.4.

On October 13, 1999, the court entered its order requiring plaintiff Rodriguez to present releases of his Social Security records to the court on or before October 26. The required releases have not been provided.

Two days before this deadline, plaintiff submitted his current motion. The motion largely repeats arguments previously made to, and rejected by, the court. The court finds nothing in plaintiff's motion which would support the relief sought, and plaintiff's motion is denied.

IT IS SO ORDERED this 10th day of November, 1999.

J. THOMAS MARTEN,

JUDGE

Appendix I – Order of the United States Court of Appeals for the Tenth Circuit filed December 16, 1999

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PASCUAL R. RODRIGUEZ,
Plaintiff-Appellee/
Cross-Appellant,

v. Nos. 99-3287 & 99-3288 & 99-3325

IBP, INC.,
Defendant-Appellant/
Cross-Appellee.

ORDER
Filed December 16, 1999

Before **EBEL** and **LUCERO**, Circuit Judges.

Plaintiff/cross-appellant seeks to stay three orders from the United States District Court for the District of Kansas, including an order to produce a release of social security records, an order of contempt for failing to do so, and an order for sanctions. All the orders were entered after a jury returned a civil verdict and the court entered judgment in favor of plaintiff. The order for sanctions ultimately resulted in plaintiff's judgment being reduced to zero. By argument that the motion for stay is moot, defendant concedes that current or future compliance with the order for release of records is not necessary pending appeal of that order. *See McClendon v. City of Albuquerque*, 79 F.3d 1014,

1020 (10th Cir. 1996) ("The purpose of a stay is to preserve the status quo pending appellate determination.").

After careful review of the motion for stay, defendant's response, the record, and applicable law, we conclude that plaintiff has not demonstrated entitlement to a stay. *See* 10th Cir. R. 8.1(B) (stating that applicant for stay must demonstrate "the threat of irreparable harm if the stay . . . is not granted"). The validity and effect of all orders, including those for sanctions, will be decided by the panel addressing the merits of the appeals. The motion for a stay pending appeal is DENIED.

Entered for the Court
PATRICK FISHER, Clerk

By: M. TALAMAS
Deputy Clerk

Appendix J – Order of the United States Court of Appeals for the Tenth Circuit filed January 10, 2000

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PASCUAL R. RODRIGUEZ,
Plaintiff-Appellee/
Cross-Appellant,

v. Nos. 99-3287 & 99-3288 & 99-3325

IBP, INC.,
Defendant-Appellant/
Cross-Appellee.

ORDER
Filed January 10, 2000

Before **EBEL** and **LUCERO**, Circuit Judges.

Plaintiff/cross-appellant seeks an order clarifying this court's Order of December 16, 1999, which denied his application for a stay. Plaintiff now asserts that sanctions were only "threatened" by the district court and that his judgment has therefore not yet been reduced by those sanctions. He questions whether he must not present the release to defendant in order to avoid the "threatened" sanctions.

In his application for stay, plaintiff acknowledged that a final order for sanctions exists. Pl. Mot for Stay at 4 ("On October 13, 1999, the court denied plaintiff's motion to reconsider and motion to stay or appeal. In addition, the

Court ordered sanctions against plaintiff."). His timely appeal on the merits from the contempt order presupposes entry of a final order.

The district court's October 13 order found plaintiff in contempt of court and sanctioned him by ordering that if he did not provide the release prior to October 28, the judgment would be reduced by 5% for each day the released were not produced until it reached zero. On November 10 the court denied plaintiff's motion to stay that order. Plaintiff never replied to defendant's argument that the motion to stay in this court was moot because the judgment had been totally reduced by the sanctions. Contrary to plaintiff's assertions this his motion to stay in this court was filed prior to "the effective date of the District Court's Order denying the stay," the record shows that it was not filed until December 1, after the judgment had been reduced to zero by the sanctions inposed on October 13.

As stated in our December 16 Order, plaintiff need not now produce the release, and the validity and effect of all orders, including the order reducing his judgment to zero for failure to timely produce the release, will be decided by the panel addressing the merits of the direct appeals. The motion for clarification is DENIED.

Entered for the Court
PATRICK FISHER, Clerk

By:
Deputy Clerk

ORDER ON REHEARING:

Appendix K – Order of the United States Court of Appeals for the Tenth Circuit filed May 30, 2001

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PASCUAL R. RODRIGUEZ,
Plaintiff-Appellee-
Cross-Appellant,

v.

Nos. 99-3287
99-3288
99-3325

IBP, INC.,
Defendant-Appellant-
Cross-Appellee.

ORDER
Filed May 30, 2001

Before **HENRY** and **MURPHY**, Circuit Judges and **MILLS**,* District Judge.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: AUDREY F. WEIGEL
Deputy Clerk

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*Honorable Richard Mills, District Judge, United States District Court for the central District of Illinois, sitting by designation.

OTHER MATERIAL ESSENTIAL TO THIS PETITION:

Appendix K – Verdict of the Jury of the United States District Court for the District of Kansas filed April 26, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PASCUAL R. RODRIGUEZ,)
Plaintiff,)
vs.) No. 94-1168-JTM
IBP, Inc.,)
Defendant.)
_____)

VERDICT

We, the jury, being duly impaneled and sworn, present the following answers to the special interrogatories propounded by the court:

1. Do you find that defendant's termination of plaintiff was in wrongful retaliation for plaintiff's exercising rights under the Workers Compensation Act?

Yes X No ____

[If your answer to Question No. 1 is "yes", please proceed to No. 2. If you answered No. 1 "no", your presiding juror should sign and date the verdict form and notify my clerk that you have completed your deliberations.]

2. What damages did plaintiff sustain as a result of defendant's retaliatory discharge?

Past lost earnings, lost health benefits and lost retirement benefits	$ 11,000
Past emotional distress, pain and suffering, embarrassment, and humiliation	200,000
Future emotional distress, pain and suffering, embarrassment, and humiliation	200,000
Total Damages	$411,000

3. Is an award of punitive damages appropriate?

Yes ___ No _X_

Date: 4/24/99

SALLY A. MARSHALL
Presiding Juror

(2)

Supreme Court, U.S.
FILED
OCT 29 2001
CLERK

No. 01-378

In The

Supreme Court of the United States

PASCUAL R. RODRIGUEZ,

Petitioner,

v.

IBP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

14 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the district court did not abuse its discretion by ordering Pascual Rodriguez to provide a release for his social security disability records.

2. Whether filing an appeal entitled Pascual Rodriguez to disobey the district court's order and prevented the district court from finding him in contempt.

3. Whether Pascual Rodriguez was entitled to stay the contempt sanction when he waited to request a stay until after the sanction was complete.

4. Whether the contempt sanction was properly crafted when it gave Pascual Rodriguez a final grace period to comply with the district court's order, when following the grace period it gradually reduced the verdict each business day that Pascual Rodriguez refused to comply, and when the verdict was grounded on the sanctioned misconduct.

LIST OF PARTIES

Pascual Rodriguez, *Petitioner*

IBP, Inc., *Respondent*

Sup. Ct. R. 29.6 Statement: IBP, Inc. is a subsidiary of Tyson Foods, Inc., which owns 100% of IBP, Inc.'s stock.

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OPINIONS BELOW

The opinion of the court of appeals denying Rodriguez's appeals (Petition, App. A) is reported at 243 F.3d 1221. The opinion of the court of appeals denying Rodriguez's motion to stay (Petition, App. I) is unreported. The opinion of the court of appeals denying Rodriguez's motion to clarify (Petition, App. J) is unreported. The opinion of the district court ordering Rodriguez to provide a release for his social security disability records (Petition, App. C) is unreported. The opinion of the district court denying Rodriguez's motion to alter or amend (Petition, App. E) is unreported. The opinion of the district court ordering Rodriguez to show cause why he should not be held in contempt (Petition, App. F) is unreported. The opinion of the district court finding Rodriguez in contempt and imposing a sanction (Petition, App. G) is unreported.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

Contrary to the statement in the Petition, this case does not involve any constitutional provisions. It does

involve Fed. R. Civ. P. 60(b), which provides in relevant part as follows:

> **Mistakes; Inadvertence; Excusable Neglect; newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. . . .

STATEMENT OF THE CASE

In 1994, Rodriguez filed a complaint in the United States District Court for the District of Kansas alleging that IBP discharged him in May 1992 in retaliation for exercising his rights under the Kansas Worker's Compensation Act. As stated by the district court, "the essential fact question in the present case [was] the physical condition of [Rodriguez] in 1992." Petition, App. G. Even Rodriguez does not dispute that his physical condition as admitted in and revealed by his social security disability records is at least highly relevant to that question, a question encompassing both liability and damages under governing Kansas law. Rodriguez never produced his social security records, despite the obligations imposed by several rules of civil procedure, a directive from the district court and, just prior to trial, his own promises to do so.

Through this misconduct, Rodriguez prevented the consideration of relevant evidence during summary judgment, appeal, remand and trial. For nearly all of that five-year period, Rodriguez not only withheld the records, he concealed their existence. After Rodriguez prevailed at trial, IBP asked the district court to order Rodriguez to provide a release for his social security records so that, if warranted, IBP could file a motion for relief from judgment under Fed. R. Civ. P. 60(b). Failure to disclose discovery materials qualifies as "misconduct" sufficient to justify relief under Fed. R. Civ. P. 60(b)(3). *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999). The discovery misconduct "need not be result-altering to merit Rule 60(b)(3) redress." *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 924 (1st Cir. 1988). The "term ['misconduct'] can cover even accidental omissions." *Id.* at 923.

On July 2, 1999, the district court granted IBP's request, ordering Rodriguez to provide a release for his social security disability records.[1] This order coincided with the district court's final judgment on the merits and was entered before any party filed an appeal. Rodriguez refused to comply. Over the next three months, the parties communicated repeatedly with the district court about Rodriguez's disobedience. The district court remained firm in its order for Rodriguez to provide a

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[1] The July 2, 1999 order was entered on the docket on July 6, 1999. The Tenth Circuit uses July 6th when referring to the order. *E.g., Rodriguez v. IBP, Inc.*, 243 F.3d 1221, 1225 (10th Cir. 2001).

release. Petition, App. E. Still, Rodriguez refused to comply, calling the release of his social security disability records an "outcome determinative process." Petition, App. G (quoting Rodriguez's written response to the district court's order for him to show cause why he should not be held in contempt).

On October 13, 1999, the district court found Rodriguez in contempt. The district court crafted a sanction that began with a grace period. If that period expired without compliance, the sanction gradually reduced the verdict each day that Rodriguez's contemptuous behavior continued. Specifically, the district court ordered that if Rodriguez failed to provide a release by October 28, 1999, the judgment would be reduced by ten percent on that date and by an additional five percent of the original judgment on each subsequent business day. Petition, App. G. The Tenth Circuit affirmed, finding that the trial court did not abuse its discretion by ordering Rodriguez to provide a release for his social security disability records or by sanctioning Rodriguez for disobeying its order. *Rodriguez v. IBP, Inc.*, 243 F.3d 1221, 1230, 1231 (10th Cir. 2001).

REASONS FOR DENYING THE WRIT

Rodriguez never acknowledges or addresses the considerations governing review on certiorari stated in Sup. Ct. R. 10. Rodriguez simply restates his unsuccessful arguments to the Tenth Circuit as to why his misconduct should have no consequences. None of the arguments provides a "compelling reason" for granting certiorari.

A. Rodriguez's references to the Constitution do not justify certiorari.

In his effort to convert his Tenth Circuit briefing into a Petition, Rodriguez adds constitutional tag lines, asserting that the sanction was "constitutionally excessive," Petition at 29, and that the Tenth Circuit violated his "substantive due process" rights, *id.* at 25, 30. Because Rodriguez never made these arguments to either the district court or the Tenth Circuit, the Court should not consider them. *United States v. United Foods, Inc.*, 121 S. Ct. 2334, 2341 (2001); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *Granfinanceria, S.A. v. Nordberg*, 492 U.S. 33, 38-40 (1989).

Even if Rodriguez had preserved these arguments, the mere existence of a constitutional issue is not by itself a "compelling reason" for certiorari. *See* Sup. Ct. R. 10 (indicating "the character of the reasons the Court considers" when reviewing petitions). Rodriguez has failed to demonstrate that these particular "constitutional" issues justify granting certiorari.

In fact, Rodriguez offers neither reasoning nor authority in support of his claims. He does not explain when a sanction becomes "constitutionally excessive" or cite any authority purporting to establish such a standard. Rodriguez also ignores that the contempt sanction gave him a final opportunity to comply before gradually reducing the verdict as Rodriguez's contemptuous conduct continued. Rodriguez was solely responsible for the size of the sanction.

Rodriguez's substantive due process allegation is equally deficient. Nowhere in the Petition does

Rodriguez identify the requisite fundamental right and liberty interest protected by the Fourteenth Amendment. *See Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997) (explaining that "a careful description of the asserted fundamental liberty interest" is a primary feature of substantive due process analysis). There is no fundamental right and liberty interest to hold onto a jury verdict. The rules of civil and appellate procedure illustrate this by providing various procedures for reversing or vacating verdicts. *E.g.*, Fed. R. Civ. P. 60(b).

B. The district court was authorized to order Rodriguez to provide a release for his social security disability records.

Rodriguez spends the bulk of the Petition, pages 4-25, arguing that the district court lacked the power to order him to provide a release for his social security disability records. The district court had the power. Rodriguez was required to produce his records during the initial discovery period, five years before trial, and he remained under a continuing duty. In the words of the Tenth Circuit: "It was Rodriguez . . . who violated the discovery rules by not making mandatory pre-trial disclosures under Rule 33(b)(1) of the Federal Rules of Civil Procedure." *Rodriguez*, 243 F.3d at 1229. Rodriguez also "fail[ed] to comply with his continuing duty to disclose under Rule 26(e)(2)." *Id.* at 1230. Despite these and other rules of procedure, the pre-trial directive of the district court, Petition, App. G, and Rodriguez's own promises, *id.*, Rodriguez never complied with his discovery obligations. The July 2, 1999 order, therefore, did not impose any new discovery obligation on Rodriguez. It required

Rodriguez to comply with a long existing discovery obligation. The district court entered its July 2, 1999 order before it lost jurisdiction over the case, jurisdiction that includes the authority to control discovery – even after trial. *Rodriguez*, 243 F.3d at 1230.

In addition, "the district court obviously found the records significant for the purpose of Rule 60(b) relief." *Rodriguez*, 243 F.3d at 1229. Rodriguez ignores Fed. R. Civ. P. 60(b), which provides a basis for *new* discovery. *See, e.g., Square Constr. Co. v. Washington Metro. Area Transit Auth.*, 657 F.2d 68, 73 (4th Cir. 1981); *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976). "[T]he policy of deterring discovery abuses which assault the fairness and integrity of litigation must be accorded precedence over the policy of putting an end to litigation." *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir. 1978); *Schultz v. Butcher*, 24 F.3d 626, 630-31 (4th Cir. 1994). "[P]arties ought not to benefit from their own mis-, mal-, or nonfeasance" during discovery. *Klonoski v. Mahlab*, 156 F.3d 255, 275 (1st Cir. 1998).

C. Rodriguez could not avoid both compliance and contempt by appealing.

Rodriguez insists that he was entitled to appeal or stay the district court's July 2, 1999 order without complying and without being held in contempt. Petition at 25-28. None of the cases he cites, however, supports this proposition, which would in effect eliminate any incentive to comply with district court orders and which would eviscerate the district court's contempt power. On the contrary, the cases cited by Rodriguez demonstrate

that the actions of the district court and the Tenth Circuit were consistent with the Rules of Civil Procedure, their underlying policy and the approach used by other circuits.

Rodriguez complains that he was required to provide a release and purge his contempt, which would moot his appeal of the contempt order, or be held in contempt and appeal. In this, he is right. *E.g., In re Cordova Gonzalez*, 726 F.2d 16, 20 (1st Cir. 1984) (cited by Rodriguez at page 26 of the Petition). Further, *In re Cordova Gonzalez* emphasizes that a district court is not required to stay contempt proceedings or sanctions during the pendency of an appeal. *Id.* at 19-21 (noting that a stay "would serve to destroy the effectiveness of the contempt proceeding").

Rodriguez's argument that he was entitled to a stay fails on the facts. As the Tenth Circuit recognized, the sanction had reduced the judgment to $0 before he requested a stay. *Rodriguez*, 243 F.3d at 1226. Rodriguez does not even attempt to justify his delay of six weeks between entry of the contempt order and the filing of his motion with the Tenth Circuit, a delay that occurred despite his contention that compliance would cause him irreparable harm.

Rodriguez nevertheless persists in his position that his defiance was somehow necessary to prevent him irreparable harm. Petition at 26-27. He fails to explain, however, what possible irreparable harm could result from providing a release of his social security disability records. The damaging or dispositive effect of clearly discoverable records on Rodriguez's claim is not the type of harm that would entitle Rodriguez to disobey the

district court's order. No consequence that might arise from disclosure of the records justifies Rodriguez's failure to comply.

CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

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